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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 627

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, TOM STOUT AND LEONARD YOUNG, MEMBERS OF SAID COMMISSION, AND RAYMOND T. NAGLE, ATTORNEY GENERAL OF THE STATE OF MONTANA, APPELLANTS,

vs.

GREAT NORTHERN UTILITIES COMPANY APPELLEE

Appeal from the District Court of the United States, in and for the District of Montana.

BRIEF FOR APPELLANTS

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FRANCIS A. SILVER,
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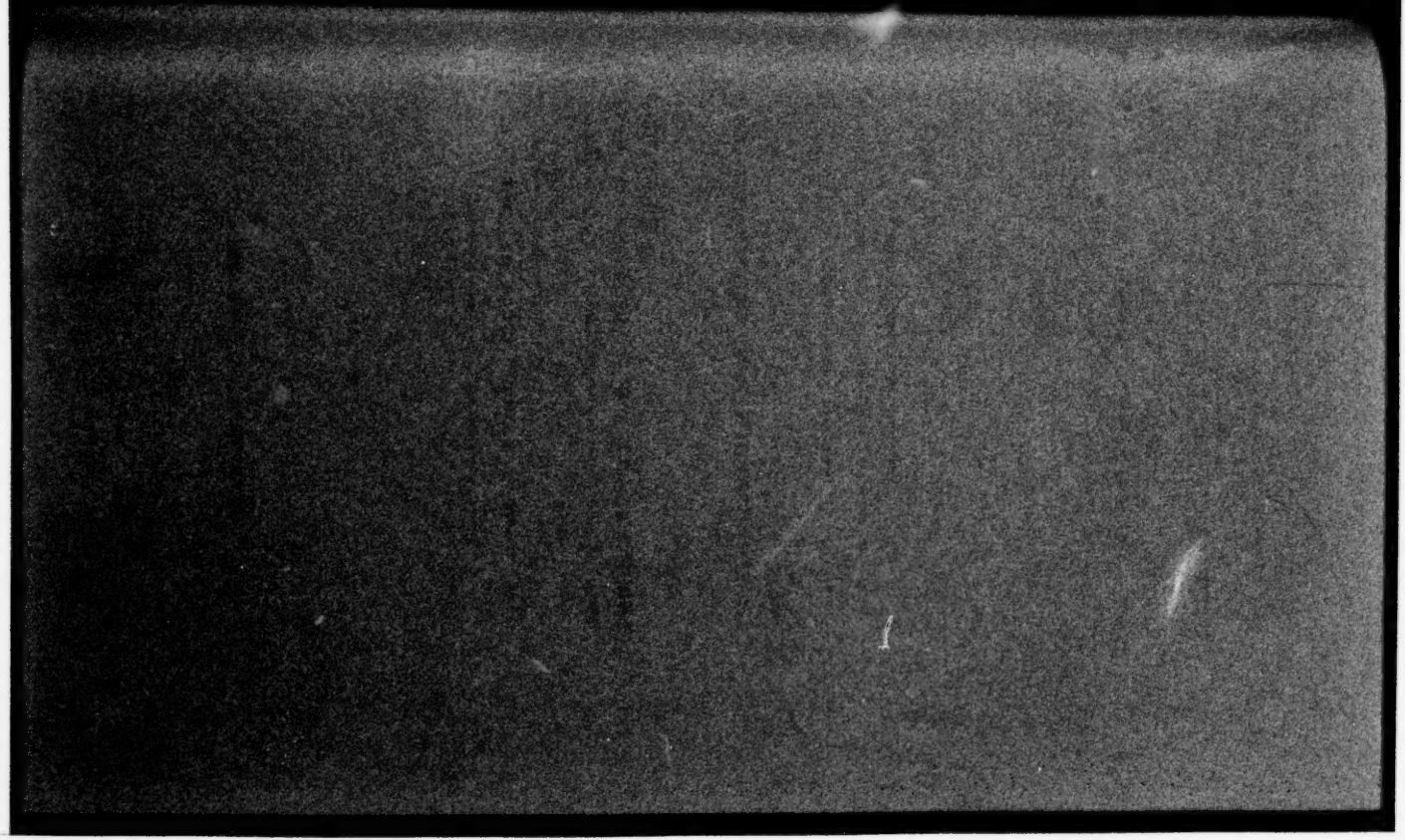
March, 1933.



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vs.

GREAT NORTHERN UTILITIES COMPANY
APPELLEE

Appeal from the District Court of the United States, in and for the District of Montana.

APPELLANTS' BRIEF.

This is an appeal under sections 238 and 266 of the Judicial Code, as amended, (28 U. S. C. A. 345 (3), 380) from a final decree of the District Court of the United States, District of Montana, granting a permanent enjoining the enforcement

of an order of the Public Service Commission of Montana, requiring appellee to file and establish certain *specific* natural gas rates for application in Shelby, Montana.

OPINIONS

The opinion of the specially constituted District Court on final hearing is reported in 1 F. Supp. 328. The opinion of the court granting the application for an interlocutory injunction is reported in 52 F. (2d) 802. A special concurring opinion of Sawtelle, Circuit Judge, is reported in 52 F. (2d) 805. The views expressed in the opinions on the application for interlocutory injunction are adopted in the opinion on final hearing. 1 F. Supp. 328.

STATEMENT OF THE CASE

The appellee (plaintiff below), Great Northern Utilities Company, a corporation, (hereinafter termed the Utility,) is now and since the year 1923 has been engaged in the business of furnishing and supplying natural gas to the public generally at Shelby, Toole County, Montana. (R. 1), carrying on its operations within the city of Shelby under the terms of a franchise duly granted and assigned to the Utility (R. 2).

The franchise provides *inter alia*, that:

> "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine." (R. 11.)

The Board of Railroad Commissioners of the State of Montana is ex-officio Public Service Commission of Montana, (Sec. 2, Ch. 52, Laws of Montana, 1913; Sec. 3880 Revised Codes of Montana, 1921).

The Utility's plant or system was designed and intended and is capable of supplying natural gas for the present and future requirements of all the people of Shelby (R. 3). Until this present dispute, the Utility has charged for its product such rates as have been approved by the Public Service Commission of Montana, (hereinafter termed the Commission).

On September 21, 1927, the Commission, upon its own initial motion, instituted an inquiry into the reasonableness of the rates charged by the Utility (R. 43). The rates in effect at that time commenced with a base rate of 60 cents per M cubic feet (R. 43). During the progress of the investigation, the Utility lowered its base rate to 50 cents per M cubic feet and made certain reductions in the lower steps (R. 43). These rates were approved tentatively by the Commission but the proceeding investigating into the reasonableness of the rates charged by the Utility was continued by the Commission and public hearings were had thereon at Shelby on November 29, 1927, and October 1, 1928 (R. 44).

Before the proceedings in Docket No. 991 were instituted, to-wit, in January, 1927, the city council of Shelby duly granted a gas franchise to the Shelby Oil and Gas Company (R. 3), and by assignment this franchise passed to the Citi-

zens Gas Company (R. 3-4). The franchise, except for the designation of the grantee and its dating, is identical in terms with the franchise under which the appellee operates (R. 12-13). During the latter part of 1928, and before any decision was rendered in Docket No. 991, the Citizens Gas Company constructed a natural gas plant or system in Shelby and in October, 1928, entered into actual competition with the appellee for the natural gas business available in Shelby (R. 5). An initial tariff was filed by the Citizens Gas Company with the Commission stating rates for natural gas service commencing with a base rate of 35 cents per M cubic feet and graduated to 22½ cents per M cubic feet for quantities in excess of 300,000 cubic feet (R. 5; R. 45). At the time of the entry of the Citizens Gas Company into the Shelby field, the Utility had 485 customers, but within a brief period, 137 of that number ceased to purchase gas from the Utility and became customers of the Citizens Gas Company (R. 5). On November 8, 1928, the Utility filed a schedule of rates with the Commission proposing to establish a base rate of 25 cents per M cubic feet (R. 5, R. 45). Before action was taken thereon, to-wit: on November 19, 1928, the Utility filed its "schedule 4-A sheet 2" which called for a base rate of 20 cents per M cubic feet up to 300,000 cubic feet and 15 cents per M cubic feet for all quantities over 300,000 cubic feet (R. 6, R. 45). The Citizens Gas Company filed a protest with the Commission against said schedule, asserting that the rates

proposed were "unfair, unjust and unreasonable" (R. 6, R. 45). This complaint was dismissed. (R. 103). In the meantime, on November 30, 1928, the Commission on its own motion in its Docket No. 1028, ordered the Utility to be and appear before it at Shelby on December 20, 1928, to submit evidence in support of the reasonableness and justness of the rates and charges proposed in schedule 4-A sheet 2 (R. 6, R. 45). Public hearing was held at the time and place scheduled (R. 6, R. 45). The Citizens Gas Company and 12 customers of said company appeared before the Commission and contended that the said rates proposed by the Utility were not proposed in good faith (R. 6, R. 45-46). The Utility also presented evidence to the Commission. No evidence was introduced tending to show the Utility's probable operating revenues and expenses under the proposed schedule (R. 66). The Utility asserted that the rates contained in schedule 4-A sheet 2 were not reasonable rates from its standpoint but were justified under the competitive conditions existing at Shelby (R. 66). It also further stated that in the event the Citizens Gas Company would meet the rates proposed in schedule 4-A sheet 2, the Utility would propose further reductions (R. 66).

On January 22, 1929, the Commission issued its Report and Order No. 1530 covering both dockets—991 and 1028 (R. 43 et seq.). Its finding in Docket No. 1028 was that the rates contained in schedule 4-A sheet 2 would not yield enough revenue to defray normal operating ex-

penses, including a fair allowance for depreciation under conditions existing at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same as they had been during the calendar year 1927 when the Utility sold more natural gas than it had during any year since its entry into the utility field, a time when it had no competitor (R. 69). The Commission further found that because the schedule of rates proposed would not produce normal operating expenses, the establishment of the same would tend to imperil or impair the ability of the Utility to render dependable adequate service to the public (R. 69-70), and that it would tend to prevent the Utility from discharging its primary duty to properly maintain its plant and equipment to the end that it would be able to render adequate service to the residents of the territory it professed to serve; and the Commission further found that by reason thereof, the proposed schedule was contrary to the public interest and therefore, unjust and unreasonable (R. 69). The Commission refused to concur in the proposed schedule 4-A sheet 2 (R. 70).

In Docket No. 991, the Commission found that the rates that were in effect at the time the inquiry was commenced and the rates that were approved tentatively, pending investigation, were and are unjust and unreasonable (R. 64). This finding was based upon a determination of the fair value of the Utility's property, used and useful, devoted to the natural gas service at

Shelby, and an analysis of the revenues and expenses of the Utility for the calendar year 1927, and the twelve months ending August 31, 1928 (R. 64), and a consideration of the volume of business available at Shelby (R. 64). Upon the evidence before it, the Commission made a finding that a schedule of just and reasonable rates for application by the Utility at Shelby should commence with a base rate of 35 cents per M cubic feet for the first 10,000 cubic feet and graduate to 22½ per M cubic feet for all over 300,000 cubic feet (R. 77). This schedule is the same as the one approved for the Citizens Gas Company (R. 4). The Utility was ordered to establish the schedule found just and reasonable on or before February 1, 1929 (R. 14, R. 78).

On February 8, 1929, the Utility commenced an action in the district court of the First Judicial District of the State of Montana, Lewis and Clark County, for the cancellation of the order as illegal (this statement as to the date of commencement of the action in the state court is not a part of the record before this court but will be found in State ex rel. Public Service Commission v. Great Northern Utilities Company, 86 Mont. 442, 444-445, 284 Pac. 772, of which this court will take judicial notice). The Utility was awarded a judgment on the pleadings against the Commission and a decree entered declaring the order null and void and enjoining its enforcement. An appeal was prosecuted by the Commission to the Supreme Court of the State of Montana where the judgment of the lower court

was reversed and the cause remanded for further proceedings (Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 293 P. 294). Subsequently, a petition for rehearing was denied (88 Mont. 232, 293 P. 294). This action was then commenced by the Utility, thus creating the situation whereby it was prosecuting concurrently in the state and federal court an action to have the order of the Commission declared invalid. Upon the case in the state court being set down for trial at the instance of the Commission, after the reversal above referred to, the Utility took a voluntary dismissal of the state case. There was, therefore, no final judgment entered in the state case.

The instant bill of complaint is in substance the same as the one that was involved in Great Northern Utilities vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

The legal contentions of the Utility, as set forth in the bill of complaint, may be succinctly stated as follows:

1. The Commission is without authority or jurisdiction to fix or establish *specific* or *minimum* rates or to require a utility to increase rates voluntarily promulgated by it which are less than just and reasonable rates. (R. 6).

2. If the Commission has been authorized by the Public Service Commission Act of Montana (Ch. 52, Laws of 1913; Secs. 3879 to 3913 inclusive, Revised Codes of Montana, 1921) to fix *specific* or *minimum* rates, or to require increases

in rates, voluntarily established by a utility, which are less than just and reasonable rates, such authorization is in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, in that: (a) Section 3891 Revised Codes of Montana, 1921, which provides "that no advance or reduction of the existing schedule shall be made without the concurrence of the commission" authorizes the Commission arbitrarily and without notice or a hearing or any opportunity for a hearing to refuse to concur in rates less than the rates prescribed or approved by the Commission as just and reasonable and section 3892 makes it unlawful for utility to charge, demand, collect etc. a greater or lesser compensation for services performed than the rate prescribed by or approved by the Commission (R. 8) and (b) there are no rules or principles prescribed governing or controlling the Commission in fixing or determining minimum rates. (R. 9).

3. The order of the Commission requiring the Utility to charge the schedule of rates prescribed by the Commission is violative of the equal protection and due process of law clauses of the Fourteenth Amendment in that the effect of the order is (a) to deprive the Utility of "*the right of competition,*" for the purpose of retaining its customers and for the protection and preservation of its investment in its gas plant or system, (R. 6), and (b) to deprive the Utility of its property, consisting of said gas plant or system (R. 6) and (c) to deprive it of the right

and liberty to contract for the furnishing of gas at the rates promulgated by it, which are less than the rates fixed by the Commission. (R. 7).

4. The Commission, in making and promulgating said order, acted without jurisdiction in that there was no evidence introduced before or considered by said Commission showing or tending to show that the rates prescribed are just or reasonable, or that the rates promulgated by the Utility are unjust or unreasonable and said order was made arbitrarily and capriciously. (R. 7).

5. Section 3908 Revised Codes of Montana, 1921, relating to penalties for failure to comply with orders of the Commission, prescribes penalties so large and severe as to amount to a denial of equal protection of the laws and deprives plaintiff of its property without due process of law. (R. 7-8).

6. Section 3906 Revised Codes of Montana, 1921, providing that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination of their invalidity by the courts having jurisdiction, denies the Utility equal protection of the law and deprives it of its property without due process of law. (R. 8).

The prayer of the complaint is that the order and rates be declared illegal and that the defendants be restrained "from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas, not discrimina-

tory, *less than the rates prescribed by said order.*" (Italics ours) (R. 9).

A motion to dismiss the complaint for want of equity was filed by the defendants. (R. 15). The motion was never *expressly* passed upon by the lower court. Subsequently, the defendants filed a joint answer (R. 15). An interlocutory injunction was granted on August 19, 1931, (52 F. (2d) 802). An appeal was prosecuted to this Court and the order granting the interlocutory injunction was affirmed. (285 U. S. 524).

Final hearing was held on September 19, 1932, upon evidence theretofore taken before an Examiner appointed by the Court. Objection to the introduction of evidence was seasonably made by the defendants, assigning the same grounds urged in the motion to dismiss. (R. 43).

The Utility attempted to amend its complaint at the final hearing by adding an allegation, in general language, to the effect that the rates prescribed by the Commission are insufficient to furnish plaintiff a fair or any return upon the value of its gas plant. (R. 114). Defendants objected to the amendment on various grounds. (R. 114). The court disallowed the amendment, terming it "unnecessary" (R. 23).

On October 5, 1932, the lower court handed down its decision awarding a permanent injunction. (R. 22). In its opinion the Court states that its views and findings as expressed in its decision upon the application for interlocutory injunction are unchanged. (R. 23). On October 15, 1932, District Judge Bourquin "for the court"

filed "Findings of Fact and Conclusion of Law" (R. 23), and on the same day entered a formal decree permanently enjoining the defendants from enforcing the order complained of and "from, in any manner, interfering with the plaintiff in charging and collecting rates * * * *less than the rates prescribed by said order.*" (R. 25). (Italics ours).

STATUTES INVOLVED

Sections 3891, 3906 and 3908, Revised Codes of Montana of 1921, attacked herein in the bill of complaint as being unconstitutional are set forth *in toto* in the Appendix to this brief, as are Sections 3880, 3883, 3888, 3899, 5074, 5075, 5076 and 5077, Revised Codes of Montana, 1921, same being relevant sections.

The order of the Commission enjoined by the lower court, aogether with the Commission's report accompanying same, are incorporated in the Statement of the Evidence (R. 43-78).

SPECIFICATIONS OF ERRORS

Appellants specify the following errors:

1. The United States District Court for the District of Montana erred in failing to grant the motion interposed by the defendants to dismiss the bill of complaint filed in the above-entitled cause on the ground that the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity, or at all. (R. 27).

2. The United States District Court for the District of Montana erred in overruling the ob-

jections of the defendants herein to the introduction of any evidence on behalf of the complainant on the ground and for the reason that the bill of complaint herein does not state facts sufficient to constitute a cause of action in equity, or at all. (R. 27).

3. The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void. (R. 27).

4. The United States District Court for the District of Montana erred in adjudging and decreeing that the order complained of by plaintiff is null and void because the record herein discloses that the specific just and reasonable schedule of rates prescribed by the defendant commission was made, issued, and promulgated to prevent ruinous competition in the premises, under the authority delegated to the defendant commission in Chapter 52, Laws of Montana, 1913, (Chap. 260, Part III, Political Code, Revised Codes of Montana, 1921), as interpreted by the highest appellate court of the State of Montana, to-wit: The Supreme Court of the State of Montana. (R. 27).

5. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained herein. (R. 28).

6. The United States District Court for the District of Montana erred in rendering a decree

for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, from enforcing the order complained of herein, in that the records do conclusively show that the specific just and reasonable schedule of rates prescribed in said order is neither confiscatory nor discriminatory, but is higher than the schedule of rates being then and there charged by plaintiff, which latter schedule the plaintiff admitted to be insufficient to produce a reasonable return on the present value of its property used and useful in the public service and which schedule of rates plaintiff admitted compelled it to operate at a loss. (R. 28).

7. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein, in that the evidence conclusively shows that the specific just and reasonable schedule of rates prescribed by the defendant commission was prescribed in the public interest and for the purpose of preventing the plaintiff and the other utility operating in the same field with plaintiff from destroying each other by ruinous competition. (R. 28).

8. The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in unrestricted competition with Citizens Gas Company, a public utility, engaged in serving the same general field as plaintiff, in the matter of rates or charges to be fixed or charged for the sale and distribu-

tion of natural gas to the public in Shelby, Montana. (R. 28).

9. The United States District Court for the District of Montana erred in holding that the plaintiff, Great Northern Utilities Company, a public utility, had and possessed, or has or possesses the right to engage in a rate-war at or in Shelby, Montana, with its competitor, Citizens Gas Company, a public utility. (R. 29).

10. The United States District Court for the District of Montana erred in failing and refusing to give due or any consideration to the right of the consumers of natural gas at Shelby, Montana, to have reasonably adequate, continuous and uninterrupted natural gas service for domestic, commercial, and industrial uses in Shelby, Montana, from the public utilities therein engaged in selling and distributing natural gas. (R. 29).

11. The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a public utility, had or has the right to disable itself by means of engaging in a rate war with Citizens Gas Company, a public utility, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom. (R. 29).

12. The United States District Court for the District of Montana erred in holding that the plaintiff Great Northern Utilities Company, a

public utility, had or has the right to disable Citizens Gas Company, a public utility, by means of engaging in a rate war, from performing its duty to the public to provide reasonably adequate service and facilities to those members of the public attached to its natural gas system and receiving natural gas service therefrom. (R. 29).

13. The United States District Court for the District of Montana erred in holding and finding that the evidence is sufficient to prove the allegation of plaintiff's bill of complaint that the population of the city of Shelby, Montana, and the demands for natural gas therein are insufficient to support the public utility natural gas plants and systems of the plaintiff and the Citizens Gas Company, a corporation, at Shelby, Montana. (R. 29).

14. The United States District Court for the District of Montana erred in holding and finding that the evidence presented established that the field served by plaintiff and the Citizens Gas Company, a corporation, as public utilities in the sale and distribution of natural gas, to-wit: Shelby, Montana, is insufficient to support and maintain more than one of the said public utilities. (R. 30).

15. The United States District Court for the District of Montana erred in holding and finding that the specific rates prescribed by the defendant commission for application in Shelby, Montana, will not afford a fair return to plaintiff upon the present fair valuation of its prop-

erty used and useful in the public service. (R. 30).

16. The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and the Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana. (R. 30).

17. The United States District Court for the District of Montana erred in holding and finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utilities, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana. (R. 30).

18. The evidence presented is insufficient to support the finding that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford fair returns to plaintiff and Citizens Gas Company, a corporation, public utilities engaged in the sale and distribution of natural gas to the public at said Shelby, Montana. (R. 31).

19. The evidence presented is insufficient to support the finding of the United States District Court for the District of Montana that reasonable natural gas rates prescribed for application in Shelby, Montana, will not afford a fair return to more than one of the public utili-

ties, to-wit: plaintiff and Citizens Gas Company, a corporation, engaged in the sale and distribution of natural gas in said Shelby, Montana. (R. 31).

20. The evidence presented is insufficient to warrant the or any finding by the United States District Court for the District of Montana as to the reasonableness of the natural gas rates prescribed by the Public Service Commission of Montana for observance by plaintiff in its sale and distribution of natural gas to the public at Shelby, Montana. (R. 31).

21. The United States District Court for the District of Montana erred in holding that the pleadings presented an issue as to whether the rates prescribed by the defendant commission would yield a fair return to the plaintiff upon the present fair value of its property used and useful in the public service. (R. 31).

22. The United States District Court for the District of Montana erred in holding that the pleadings are sufficient to present the question of the reasonableness and justness of the rates prescribed by the defendant commission. (R. 31).

23. The United States District Court for the District of Montana erred in failing to find the facts specially and to state separately its conclusions of law thereon as is required by Rule 70½ of the Equity Rules promulgated by the United States Supreme Court June 2, 1930, to take effect October 1st, 1930. (R. 31).

24. The United States District Court for the District of Montana erred in rendering a de-

cree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the provisions of Chapter 52, Laws of Montana, 1913 (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921). (R. 32).

25. The United States District Court for the District of Montana erred in rendering a decree for the plaintiff herein in that the pleadings and evidence conclusively show that the plaintiff is engaged in operating a public utility in the city of Shelby, State of Montana, for the distribution of natural gas under and by virtue of a special franchise granted by the city of Shelby, Montana, a municipal corporation, pursuant to the provisions of Sections 5074 to 5077, both inclusive, of the Revised Codes of Montana, 1921, and that the plaintiff company accepted said special franchise as assignee of the original grantee, subject to the express proviso contained in said franchise, as follows, to-wit: "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of

Montana shall order and determine," thereby waiving any right it might otherwise have to engage in a rate war with a competitor or to charge any rates or rate lower than specific just and reasonable rate or rates prescribed by the Board of Railroad Commissioners of the State of Montana in its *ex-officio* capacity as Public Service Commission of Montana. (R. 32).

26. The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the specific rate order of the defendant commission is confiscatory in that the Fourteenth Amendment to the Constitution of the United States does not guarantee to plaintiff a reasonable return on the present fair value of its property used and useful in the public service, but guarantees it merely an equal opportunity to secure such reasonable return, which equal opportunity was preserved to plaintiff in the premises by the minimum or specific rate order promulgated by the defendant commission. (R. 33).

27. The United States District Court for the District of Montana erred in rendering a decree for plaintiff herein on the theory that the State must abdicate its regulating power when the field will not support two utilities because plaintiff entered the public utility field as a distributor and seller of natural gas at Shelby, Montana, without any exclusive right to so occupy said field and without any guarantee against competition. (R. 33).

28. The United States District Court for the District of Montana erred in engrafting an

amendment upon Chapter 52, Laws of 1913, (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), in conflict with the meaning and interpretation of said chapter as construed by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana. (R. 33).

29. The United States District Court for the District of Montana erred in passing upon the issues involved herein in refusing to accept the construction placed upon Chapter 52, Laws of 1913, (Chapter 260, Part III, Political Code, Revised Codes of Montana, 1921), by the highest appellate court of the State of Montana, to-wit: the Supreme Court of the State of Montana. (R. 33).

30. The United States District Court for the District of Montana erred in overruling defendants' objections to the testimony of plaintiff's witness E. R. Foster, stating the conclusions drawn by said witness from plaintiff's exhibit No. 5, in substance to the effect that said exhibit No. 5 indicates that if the rate prescribed by the defendant commission had actually been charged during the periods covered by said exhibit No. 5, to-wit: January 1st, 1929, to July 31, 1932, both inclusive, the plaintiff would not have earned enough to pay operating expenses, including depreciation, and have left a net amount which would produce a fair return based upon the valuation found by said defendant commission. (R. 34).

31. The United States District Court for the District of Montana erred in overruling the de-

fendants' objections to the testimony of plaintiff's witness E. R. Foster, that the total revenue of plaintiff company for the calendar year 1929, applying the rates prescribed by the defendant commission would be $19,753.34. (R. 34).

32. The United States District Court for the District of Montana erred in overruling defendants' objections to testimony of plaintiff's witness E. R. Foster, in substance to the effect that the plaintiff company would, for the calendar year 1929, fall $11,669.64 short of meeting the requirements fixed by the defendant commission after allowances for depreciation and return, if the total revenue of the plaintiff company were computed upon the basis of applying the rates prescribed by the defendant commission to the quantity of natural gas sold by the plaintiff company during the year 1929. (R. 34).

33. The United States District Court for the District of Montana erred in admitting in evidence on behalf of plaintiff over the objection and exception of defendants a document consisting of two pages, headed respectively: "Sheet 1, Great Northern Utilities Company, Gas Department Only, Study of Allowance for Depreciation and Return, Based on Montana Commission Order No. 1530," and "Sheet 2, Great Northern Utilities Company, Gas Department Only, Study Showing Deficit for Three Years and Seven Months Based on Rate Found and Allowances for Depreciation and Return in Commission Order No. 1530, Together with Actual Operating Expenses from Company Records", (Plaintiff's Exhibit No. 5), and which reads as follows:

SHEET 1.

		1929	1930	1931	1932 to July 31st
Value of property as of 1-1-28 p. 15, Commission Order No. 1530	$43,214.22				
Net Additions during year 1928 from company records	3,964.88				
Total at first of year		$47,179.10	$47,573.44	$48,618.55	$48,790.73
Net additions during year		394.34	845.11	172.18	534.60R
Depreciation on Value at 1st of year as allowed in Commission Order No. 1530. (8% on all except Land at $1,300. plus Working Capital at $2,500.)		$ 3,470.33	$ 3,501.88	$ 3,585.16	$ 2,093.74*
4% on net additions during year		15.77	33.80	6.89	1.25 R
Total for depreciation		3,486.10	3,535.68	3,592.05	2,092.49
Return on Value at 1st of year as allowed in Commission Order No. 1530 (8%)		$ 3,774.33	$ 3,085.88	$ 3,889.48	$ 2,276.90*
4% on net additions during year		15.77	33.80	6.89	1.25 R
Total for return		3,790.10	3,839.68	3,896.37	2,275.65
Total Sales, M Cu. Ft.		73,160.5	67,375.0	55,889.0	39,559.5
Depreciation per M Cu. Ft.		$ .0477	$ .0525	$ .0643	$ .0529
Return per M Cu. Ft.		.0518	.0570	.0697	.0575

*Based on 7 months.

R denotes reduction.

SHEET 2.

	1929 Total	1929 Per MCF	1930 Total	1930 Per MCF	1931 Total	1931 Per MCF	1932 to July 31 Total	1932 to July 31 Per MCF
M Cu. Ft. Sold	73,160.5		67,375.0		55,889.0		39,559.5	
Expenses								
Transmission and Distribution	$2,339.76	$ .0320	$2,342.97	$ .0348	$1,843.97	$ .0330	$ 714.05	$ .0181
Commercial	3,229.60	.0442	2,679.47	.0398	1,846.97	.0331	912.71	.0231
General	8,987.64	.1228	8,287.37	.1230	8,071.19	.1444	5,385.04	.1361
Undistributed	1,166.42	.0159	1,247.85	.0185	1,307.75	.0234	1,456.71	.0368
Taxes	1,702.54	.0233	1,007.14	.0149	1,002.18	.0179	606.25	.0153
Total	17,425.96	.2382	15,564.80	.2310	14,072.06	.2518	9,074.76	.2294
Cost of Gas	6,750.82	.0923	5,388.99	.0800	5,399.28	.0966	3,816.80	.0965
Total Expenses	24,176.78	.3305	20,953.79	.3110	19,471.34	.3484	12,891.56	.3259
Depreciation based on allowance by Montana Commission in Order No. 1530	3,486.10	.0476	3,535.68	.0525	3,592.05	.0643	2,092.49	.0529
Fair return based on Montana Commission Order No. 1530	3,790.10	.0518	3,839.68	.0570	3,896.37	.0697	2,275.65	.0575
Total Required Revenue	31,452.98	.4299	28,329.15	.4205	26,959.76	.4824	17,259.70	.4363
Estimate Revenue based on rate p. 26 of Commission Order No. 1530 (Av. Price $27 per M Cu. Ft.)	19,753.34	.2700	18,191.25	.2700	15,080.03	.2700	10,681.07	.2700
Deficit	11,699.64	.1599	10,137.90	.1505	11,869.73	.2124	6,578.63	.1663

(R. 34).

34. The United States District Court for the District of Montana erred in admitting in behalf of plaintiff over the objection and exception of defendants a document headed, "Great Northern Utilities Company, Gas Department Only, Study Showing Application of Montana Commission Report and Order No. 1530 to Actual Sales of Gas for Past Three Years", (Plaintiff's Exhibit 6), and which reads as follows:

	Per M Cu. Ft.			
	1929	1930	1931	1932 to July 31
	$	$	$	$
Operating Expenses exclusive of costs of gas purchased and depreciation allowance (p. 25 of Order No. 1530).	.1354	.1354	.1354	.1354
Actual Cost of Gas from company records	.0923	.0800	.0966	.0965
Depreciation Allowance at 8%, based on Commission Order (p. 25 of Order No. 1530)	.0476	.0525	.0643	.0529
Rate of Return at 8% based on Commission Order (p. 26 of Order No. 1530)	.0518	.0570	.0697	.0575
Total Requirement	.3271	.3249	.3660	.3423
Average Revenue which will result from application of Rate Schedule ordered by Commission (p. 26 of Order No. 1530)	.2700	.2700	.2700	.2700
Deficit	.0571	.0549	.0960	.0723

(R. 38).

35. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, purporting to explain or analyze the data contained in plaintiff's exhibits Nos. 5 and 6, the substance of said witness' testimony being as follows:

That the actual operating expenses of the company per M cubic feet are materially higher than the estimated expenses made by the commission in the order complained of, to-wit: $.1354 per M. cubic feet for the natural gas sold. In Exhibit No. 6, operating expenses have been set up at the figures specified by the commission and to those figures have been added the actual cost of gas per M. cubic feet sold, shown in the company's record. The depreciation allowances and the allowances for return shown on Exhibit No. 6 have been transferred from Exhibit No. 5 and for the periods shown are based upon the commission's figures as indicated in the order complained of for the years 1929 to 1931, inclusive, and the first seven months period of 1932. In comparing the total requirements for all expenses with the average revenue which the commission said would result from their rate schedule as ordered, we find deficits as follows: 1929, $.0571 per M. cubic feet; 1930, $.0549 per M. cubic feet; 1931, $.0960 per M. cubic feet; and for the seven months ending July 31, 1932, $.0723 per M. cubic feet of gas sold. The application of the commission rate to actual gas sales for the same periods shows that those rates are about 7¼ cents per M. cubic feet under that

which would be necessary to wipe out the deficit. This study was prepared to show what might result if all the estimates made by the commission were applied with the exception of the cost of gas, a point which is an actual fact. There may be some question about operating expenses at any time and consequently the estimated expenses as indicated in the commission's order were set up. The only thing in the study that is different from those estimates in the commission's order is the cost of gas, that is, the amount actually paid per M. cubic feet during these periods.

In compiling Exhibits Nos. 5 and 6, witness followed in general the same methods that the commission followed in its report in building a rate.

The revenues shown on sheet 2 of Exhibit No. 5, resulting from the application of the commission rate may be compared against witness' total expense figures exclusive of cost of gas for the same year and show just a slight coverage of the expenses because of taxes, with nothing for cost of gas, nothing for depreciation, and nothing for a fair return. (R. 38).

36. The United States District Court for the District of Montana erred in overruling defendants' objection to plaintiff's witness E. R. Foster's testimony, in substance, to the effect that as a result of the experience since competition commenced and based upon his own personal knowledge, there would not be a wide divergence from the average found by the commission in its

customers' analysis in comparison with a customers' analysis at the present time. (R. 39).

37. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance that the spread between expense figures found by the commission of $.1354 per M. cubic feet exclusive of cost of gas, and the witness' figures based on actual operations is about ten cents per M. cubic feet. (R. 40).

38. The United States District Court for the District of Montana erred in overruling defendants' objection to the testimony of plaintiff's witness E. R. Foster, stating in substance to the effect that the spread between the commission's findings as to expense per M. cubic feet and the actual result of the company's experience is so great that in the witness' judgment it would not be affected at all by any change in the 27-cent figure and that the revenue requirements during the four periods indicated on page 2 of Exhibit No. 5 checks from 42.05 cents per M. cubic feet sold to 48.24 cents per M. cubic feet sold, and the requirement of each of the periods was much greater than the top step of the rate set by the commission, to-wit: 35 cents per M. cubic feet, and on the basis of average revenue requirement shown on the witness' exhibit No. 5, it would be necessary for the plaintiff to get an average of approximately 45 cents per M. cubic feet as against the commission's allowance of 27 cents average. (R. 40).

39. The United States District Court for the District of Montana erred in overruling defendants' motion made at the conclusion of the plaintiff's case to strike from the record all of the testimony of plaintiff's witness E. R. Foster relative to the application of the commission's prescribed rate in its report and order No. 1530, and the estimated earnings thereof, and all evidence concerning Exhibits Nos. 5 and 6, and each of said exhibits, for the reasons that the same do not tend to support any issues tendered by the complaint herein, are wholly irrelevant, and on the further ground that the question of the confiscatory character of the rates prescribed by the commission is nowhere put in issue by the complaint herein. (R. 40).

SUMMARY OF ARGUMENT

Appellants' argument in its basic features may be briefly summarized as follows:

The Complaint does not state facts sufficient to constitute a cause of action. Measured by the facts pleaded, the bill of complaint presents but two propositions, neither of which involves a substantial Federal question, namely: Does the Public Service Commission of Montana have the power and authority to prescribe or fix *precise* rates to be charged by a public utility for its service or product? And, if so, is this authority circumscribed in circumstances where there are competing utilities in a limited field?

The Public Service Commission Act of Montana (Ch. 52, Laws of 1913, Secs. 3879-3913 Revised Codes of Montana, 1921) has been con-

strued by the Supreme Court of Montana—the highest appellate court of the State—to clothe the Commission with the power to fix *precise* rates to be charged by a public utility for its product or service. Unless some constitutional inhibition precludes such a construction as lawful, the first question presented must be answered in the affirmative.

Inasmuch as the restraint imposed upon legislative action by the 5th and 14th Amendments to the Federal Constitution is the same, the inhibition, if any, of the Constitution against the State's exercise of *specific* rate-fixing power may be determined by the extent to which the Federal Government has, consistent with the 5th Amendment, exercised specific rate-making authority. It is conceded here, as it must be by reason of the decisions of this Court, that under the Transportation Act of 1920, Congress vested power in the Interstate Commerce Commission the lawful power and authority to fix *minimum* or *specific* rates for rail carriers operating in interstate commerce. The power to regulate interstate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those contained in the 5th Amendment. Therefore, the recognition of the power and authority in the Federal Government to fix *minimum* and *specific* rates for interstate utilities involves the recognition that within the field of regulation of intrastate utilities the State has similar power and authority.

The lower court, while recognizing and upholding the authority of the Montana statute in this

respect, engrafted an exception on the statute, inconsistent with the interpretation given the statute by the Montana Supreme Court, to the effect that under conditions of competition between public utilities in a limited field "the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity." In this the lower court erred in two respects: first, in attempting to revise the construction placed upon the Montana statute by its own Supreme Court, and, secondly, in upholding the alleged right of competition.

Whether a state statute shall be construed one way or another is a state question, the final decision of which rests with the courts of the state, and when dealing with state statutes, challenged under the 14th Amendment, a federal court must accept the meaning thereof as construed by the highest court of the state and is not permitted to reexamine the construction as to its propriety or accuracy.

As construed by the State Supreme Court the purpose of the statute is to determine a price which shall be just and reasonable to all concerned —the utility as well as the consumer—and to insure to the consumer reasonable service and to the utility a reasonable return. The construction denies to utilities competing in the same field the right to charge less than the *precise* just and reasonable rates fixed by the Commission. This construction is sound and consonant with the protections and guarantees of the 14th Amendment.

The 14th Amendment does not protect against competition nor does it guarantee to a public utility, operating under a non-exclusive franchise, any right of competition in rate matters. A public utility engages in the business of operating a public utility not by reason of the general right to engage in a lawful business which is part of the liberty of the citizen but only as a privilege to be exercised in virtue of a public grant or franchise. This privilege may be granted or withheld by the state or conferred under such limitations as the state may impose, subject, of course, to the principle that the state may not impose conditions that require the relinquishment of rights guaranteed by the Federal Constitution.

When the Utility accepted the franchise to operate as a public utility at Shelby, it accepted it subject to the limitations, *inter alia*, that the franchise itself was non-exclusive and that the State of Montana reserved the right to regulate its operations in the interest of the public, including the right to fix *precise* just and reasonable rates for its product and service. Both of the limitations being well within the recognized powers of the State, any defect therein from the Utility's standpoint is a "congenital defect" and an appeal to the 14th Amendment to protect property from a "congenital defect" must be in vain. Moreover, the right for which the Utility contends—the right to drive its competitor from the field through "cut-throat" competition—is the right to monoply, which is inconsistent with the character of the Utility's non-exclusive franchise.

The Utility's purpose is to render its franchise exclusive in fact, although not in law, and thus to circumvent the established policy of the State of Montana which does not permit its cities or towns to grant exclusive franchises. Furthermore, the franchise granted by the City of Shelby, upon acceptance, became a binding contract between the city and the grantee and by virtue of section 3 thereof the Utility, as asignee of the grantee, obligated itself to charge only such *specific* just and reasonable rates as the Commission might order and determine.

The question of confiscation due to any inadequacy in the prescribed rates to afford a fair return is not presented by the bill of complaint. There are no allegations in the complaint with respect to those elements which control a determination as to the confiscatory character of rates, viz: present fair value of property or plant, used and useful for the convenience of the public, amount of revenue that the prescribed rates would produce, the reasonable expenses of operation under prudent management, fair allowance for depreciation and fair rate of return. The approved rule of pleading in confiscation cases is that in order to invoke constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be *specifically* set forth, and from them it must *clearly* appear that the rates would *necessarily* deny to the plaintiff just compensation and deprive it of its property without due process of law. Tested by the rule, the bill of complaint

obviously does not tender the issue of confiscation.

Furthermore, the Utility, in its complaint, does not assert any right to charge rates *higher* than the rates prescribed by the Commission. It contends only for the right to charge rates *lower* than those fixed by the Commission as just and reasonable. Its prayer specifically requests that the Commission be enjoined from preventing the Utility from charging rates for natural gas "*less* than the rates prescribed by said order." Under the theory of the complaint, the facts alleged and the relief requested, any question as to the adequacy or inadequacy of the prescribed rates is moot. The question as to whether the rates will afford a fair return is purely hypothetical and until such time as the Utility asserts the right to charge a compensatory or non-confiscatory schedule of rates, there is not present the elements of a justiciable controversy.

Nor, can the *per curiam* order of this Court affirming the interlocutory injunction granted by the lower court be reasonably construed as broadening the issues tendered by the bill of complaint or introducing a new issue not embraced within the complaint. The order of affirmance is to be read only as holding that the discretion of the lower court in granting an injunction *pendente lite* had not been abused.

Nevertheless, the evidence amply supports the conclusion that the prescribed rates are just and reasonable and non-confiscatory. Considering the aggregate volume of sales normally available at Shelby to both utilities, the revenues that would

be derived from such aggregate sales on the basis of the prescribed rates, the reasonable costs of operation under prudent and careful management, the aggregate value of the property devoted to the natural gas service at Shelby, actual operating experience at Shelby has demonstrated that the rates fixed by the Commission are on a *higher* level than is called for by a strict application of the "fair return" rule. In other words, it is fairly apparent from the *actual* experience of the rival utility that the Commission's rates will yield upon the normal aggregate volume of gas sold by both companies, revenues sufficient to defray all the necessary operating expenses of both companies, under reasonable and prudent management, and afford a fair return upon the aggregate value of the two systems. Aggregate revenues being sufficient to provide a fair return upon the aggregate value of property devoted to the public service, failure of the Utility to earn a fair return because of its inability to acquire or hold its share of the patronage does not involve any violation of the 14th Amendment. The state is not compelled by the Constitution to guarantee economic results. The law guarantees only equal opportunities for competition.

The bill of complaint alleges generally the unconstitutionality of sections 3906 and 3908 Revised Codes of Montana, but, because the evidence shows that the Utility has not been and is not now being adversely affected by the sections or either of them, or any action taken thereunder, this Court is not called upon to give any opinion in this respect.

ARGUMENT

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

(Specifications Nos. 1 and 2)

The sufficiency of the Bill of Complaint to state a cause of action in equity or at all was raised by appellants by moving to dismiss the complaint (R. 15) and by objecting to the introduction of any evidence (R. 43). The refusal of the trial court to sustain these objections is made the basis of Specifications of Errors Nos. 1 and 2, supra, (Assignments of Errors Nos. I and II, R. 27).

Omitting reference to the allegations of the Bill of Complaint that have to do with official and corporate capacities, the ultimate facts set forth in the Bill are these:

The Utility, (plaintiff below) is the owner and operator of a natural gas plant or system in the city of Shelby, Montana, which it constructed (at a cost "in excess of fifty thousand ($50,000.00) dollars") and commenced to operate in 1923, under and by virtue of the terms of a franchise granted by the city of Shelby. Its plant or system is so designed and constructed and its supply of natural gas is such that the Utility has and has had since the commencement of its operations and will continue to have for the future, a plant or system and supply of natural gas sufficient to take care of the present and future needs and requirements of the people of said city. From the commencement of its operation up to November, 1928, it charged for its product such rates as were approved by the Com-

mission. During the latter part of 1928, Citizens Gas Company, constructed a plant and system for supplying natural gas to the inhabitants of Shelby, under and by virtue of the terms of a franchise granted by the City of Shelby which is identical in terms and wording except as to dates and grantee named as the Utility's franchise; both carry the proviso that *"The rates to be charged for gas of whatever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine."* Citizens Gas Co. commenced to distribute natural gas in Shelby in October, 1928, under a schedule of rates, approved by the Commission, lower than the rates then in effect and being charged by the Utility. Within a brief period after Citizens Gas Company commenced operations, 137 patrons of the Utility ceased to purchase gas from it and became patrons of Citizens Gas Company. On November 8, 1928, the Utility proposed and filed with the Commission a schedule of rates materially lower than the schedule approved for its rival. Before any action was taken thereon and on November 19, 1928, the Utility proposed and filed a still lower schedule of rates. Upon its own motion the Commission ordered a public hearing to determine the reasonableness and justness of the rates proposed by the Utility on November 19, 1928. After hearing held, the Commission refused to concur in the schedule of November 19, 1928, and issued an order requiring the Utility to establish a schedule of rates in all respects similar to the schedule of rates ap-

proved for the rival company. The Utility refused to and refuses to comply with said order.

In addition to the above facts the bill of complaint contains numerous assertions as to questions of law, conclusions of the pleader as to matter of facts and much by way or argument. These are not admitted by the motion to dismiss nor objection to the introduction of evidence.

> Missouri Pacific R. Co. vs. Norwood, 283 U. S. 249, 254; 75 L. ed. 1010, 1016.

The rule has been correctly and succinctly stated by this Court in Missouri Pacific R. Co. vs. Norwood, supra, as follows:

> "The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed admitted by motion to dismiss. * * * The state laws are presumed valid. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity."

Measured by the facts plainly and properly pleaded, the bill of complaint presents but two questions: Has the State authority to fix *precise* rates to be charged by a public utility for its service or product? and if so, is this authority subject to an exception in cases where there is competition between public utilities in the same field of service? The judges composing the special statutory court were all of the opinion that the State possesses the right to prescribe

specific or *absolute* rates (52 F. (2d) 802, 804, 808) but a majority of the lower court were of the view that the Montana statute authorizing the Commission to fix *precise* rates is subject to the exception that when utilities are occupying a limited field they have the right to compete generally and in the matter of rates charged "to the last extremity." (52 F. (2d) 802, 804, 805). The minority of the lower court was of the view that the utilities do not have any constitutional right of competition, (52 F. (2d) 805, 809), but was of the opinion that the precise rates prescribed by the Commission were confiscatory in character. (52 F. (2d) 802, 811). The question of confiscation due to any inadequacy of the rates prescribed is not a question presented by the pleadings, as we shall hereafter show.

THE STATE'S RIGHT TO FIX MINIMUM OR SPECIFIC RATES.

Under Section 11 of the Public Service Commission Act of Montana (3891 Revised Codes of Montana, 1921) every public utility is required to file with the Commission schedules showing all rates, tolls and charges which it has established and it is not permitted to make any advance or reduction therein without the concurrence of the Commission. This section construed in connection with the whole act (Ch. 52, Laws of 1913; Secs. 3879-3913 Revised Codes of Montana, 1921) has been held to clothe the Public Service Commission of Montana with the power to fix the *precise* rate to be charged by a public utility for its product or service.

Great Northern Utilities Co. vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

The duties of a public utility within the State of Montana have been fixed by statute. (3883 R. C. M. 1921). Every public utility is required to furnish reasonably adequate service and facilities at just and reasonable rates. (id) "*Not only must the charges be 'just and reasonable' but the service and facilities for rendering that service must be adequate*" (88 Mont. 207). The machinery is provided by the act for bringing about the fulfillment of the purposes of the statute. The obligation rests upon the Commission to see to it that the purposes of the statute are carried out. As pointed out by the Montana Supreme Court (88 Mont. 211):

> "*The Commission is required* not only to regulate charges, but it is likewise made its duty as well *to see to it that reasonable service is rendered*, and that the equipment is reasonable adequate. It is apparent that the legislature intended to clothe the Commission with power to supervise the acts of the Utility in matters other than rate fixing. *The legislature evidently reasoned that intermittent service is as costly, and at least equally detrimental to the public interest, as is an exhorbitant charge for the service.* (Italics ours).

Giving full consideration to the various provisions of the Act, the Supreme Court of Montana properly concluded that (88 Mont. 223):

> "The purpose (of the Act) * * is to determine a price which shall be just and reasonable to all concerned—the utility as well as the consumer—*and to insure to the consumer reasonable service* and to the utility a reasonable return." (Italics ours).

The design and purpose of the act being perfectly clear, it is at once apparent that the power given the Commission to fix *specific* just and reasonable rates has a real and substantial relation to the avowed purpose of the Act. As said by the Supreme Court of Montana (88 Mont. 218-19):

> "*The reasonable service* which the statute requires the utility to furnish, and *which it is made the duty of the Commission to see is furnished, must be paid for out of the revenues derived from the sale of the product of the utility.* 'Service without compensation can not be compelled without violating the Federal Constitution.' (Indianapolis Gas Co. v. Indianapolis; 82 Fed. 245; St. Louis & S. F. R. Co. v. Gill (1895), 156 U. S. 649, 39 L. Ed. 567, 15 Supt. Ct. Rep. 484.) *It is an inexorable law that if more is taken out than is put in, regardless of how large the surplus, the supply will eventually be exhausted. Thus, if the utility may sell its product at a loss, then the provisions of the statute are rendered impotent, for the Commission is unable to regulate the character of service to be rendered.*" (Italics ours).

The trial court wholly ignored the purpose of the statute as declared by the Supreme Court of Montana and gave no consideration whatsoever to

the rights of the consumers to have reasonably adequate service and facilities, (Specifications Nos. 10, 11 and 12, supra, R. 29) nor to the purpose of the order in question (Specifications Nos. 4, 7, 8 and 9).

Permitting the Commission to fix *specific* just and reasonable rates, rather than mere *maximum* just and reasonable rates, is but a means to the legitimate end of requiring persons engaged in the public service to provide adequate service and facilities. And, as observed by this Court in Stephenson vs. Binford, 77 L. ed. (Dec. 6, 1932): "The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to the courts. *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and end.*" (Italics ours).

The conception of the state's function of regulation with reference to public utilities, as outlined by the Supreme Court of Montana, is in exact accord with this Court's concept of regulation under the Commerce Clause. In Dayton-Goose Creek Ry. Co. vs. United States, 263 U. S. 456, 478, 44 S. Ct. 169, 68 L. ed. 388, it was said:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained the

> power of regulation is exhausted. This is too narrow a view of the commerce clause. *To regulate* in the sense intended *is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety* * * *" (Italics ours.)

The authority of the state to fix *precise* rates has been upheld by a number of state appellate courts.

> Coleman Gas Etc. vs. Santa Anna Co. S. W. (2d), decided Jan. 25, 1933;
>
> Mapleton vs. Iowa Public Service Co. (Iowa) 223 N. W. 476;
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> Tipton vs. Tipton Light & Heating Co. (Iowa) 157 N. W. 844;
>
> Pinney and Boyle Co. vs. Los Angeles, 168 Cal. 12, 141 Pac. 620;
>
> Economic Gas Company vs. Los Angeles, 168 Cal. 448, 143 Pac. 717;
>
> Community Natural Gas Co. vs. Natural Gas & Fuel Co. (Tex.) 34 S. W. (2d) 900;
>
> City of Farmersville vs. Texas-Louisiana Power Co. (Tex.) 55 S. W. (2d) 195.

So far as research discloses this Court has not had before it the precise question as to whether a state can fix *absolute* or *minimum* rates for public utility products or service. It has, however, upheld the right of the State to fix *minimum*

rates for *private* contract carriers operating over the public highways of the State.

Stephenson vs. Binford, supra.

In the last cited case there was challenged, *inter alia,* a provision in the Texas motor carrier statute authorizing the Railroad Commission of Texas to prescribe *minimum* rates for private contract carriers not less than those prescribed for common carriers for substantially the same service. As to this provision this Court said:

> "Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids."

The right of a State to fix a *specific* rate or to prescribe either maximum or minimum rates for intrastate traffic has been recognized by this Court:

> Arizona Grocery Co. vs. A. T. & S. F. Ry. Co. 284 U. S. 370, 76 L. Ed.——;
>
> Minnesota Rate Case, 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729.

In the Arizona Grocery case, supra, this Court said:

> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate

or the maximum and minimum limits within which the carriers' published rate must come.

"When under this mandate the Commission declares a *specific* rate to be reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of *specific rates by state commissions,* and *in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.*

"* * * The Commission, in naming the rate, speaks in its quasi-legislative capacity. *The prescription of a maximum rate, or maximum and minimum, is as legislative in quality as is the fixing of a specified rate.*" (Italics ours.)

In the Minnesota Rate Case, supra, Mr. Chief Justice Hughes used the following language concerning the Interstate Commerce Act as it then existed with relationship to its effect on intrastate commerce:

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates or prescribe, or authorize the commission to prescribe, *either maximum or minimum rates for intrastate traffic. It can not be supposed that Congress* sought to accomplish by indirection

that which it expressly disclaimed, or *attempted to over ride, the accustomed authority of the states* without the provision of a substitute. *On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with the subject.*" (Italics ours.)

SPECIFIC OR MINIMUM RATE-MAKING POWERS OF FEDERAL GOVERNMENT.

As above noted, the federal government has undertaken the exercise of *minimum* and *precise* rate powers in the Transportation Act of 1920 (49 U. S. C. A. 71 et seq.). The validity of this legislation has been conceded by the Utility (52 F. (2d) 802, 807). This concession is forced by the decisions of this Court recognizing the validity of the power conferred.

Arizona Grocery Case, supra;

Dayton-Goose Creek Ry. Co. vs. U. S. 263 U. S. 456, 44 St. Ct. 169, 68 L. ed. 388;

New England Divisions Case, 261 U. S. 184, 43 S. Ct. 470 67 L. ed. 605;

United States et al vs. Ill. Cent. R. R. Co. et al, 263 U. S. 515 44 S. Ct. 190, 68 L. ed. 417.

The Utility attempted in the trial court to justify the exercise of federal minimum rate powers with respect to commerce among the states by contending that the commerce clause of the Constitution is an express grant of power that is not limited by the Fifth Amendment. The

point was made that the power of Congress to regulate interstate commerce was granted before the Fifth Amendment was adopted and that the Fifth Amendment to no extent curtailed this power. This argument fails to recognize that the power of Congress to regulate commerce among the states is analogous to the police power of the states in regulating public utilities and that in the field of federal regulation of interstate commerce the Fifth Amendment offers the same limitations upon the federal government as does the Fourteenth Amendment upon the power of the states in regulating public utilities.

That there is no validity to the contention that because the power existed in Congress to regulate commerce among the states prior to the adoption of the Fifth Amendment, the amendment to no extent curtailed this power is manifest from the decision of this Court in Carroll v. Greenwich Insurance Co., 199 U. S. 401, 26 S. Ct. 66, 50 L. ed. 246, where it was said (199 U. S. 410):

> "It is true that, by the provision in the body of the instrument, Congress has power to regulate commerce, and that the Act of Congress referred to in the cases cited was passed in pursuance of that power. *But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights.*" (Italics ours.)

In United States v. C. M. St. P. & P. R. R. Co.,

282 U S. 311, 51 S. Ct. 159, 75 L. ed. 359, this Court reiterated the doctrine that (282 U. S. 327):

> "The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty, or property without due process of law."

It being established that the Fifth Amendment offers no bar to the exercise by Congress of minimum rate powers in the regulation of commerce between the states, it follows that the Fourteenth Amendment does not forbid the states from exercising minimum rate powers with respect to intrastate public utilities.

More recently this Court has pointedly stated that the restraint imposed upon legislation by the due process clauses of the 5th and 14th Amendments is the same.

> Heiner vs. Donnan, 285 U. S. 312, 76 L. ed. 772;
>
> Coolidge vs. Long, 282 U. S. 582, 75 L. ed. 562.

In conclusion on this phase of the argument, we submit that the Supreme Court of Montana was fully justified in saying (88 Mont. 228; 293 P. 307):

> "So that it would seem that if Congress may empower the Interstate Commerce Com-

> mission to fix precise rates, without contravening the provisions of the Fifth Amendment, the state may, as to a public utility doing business wholly within the State of Montana, do likewise without violating the provisions of the Fourteenth Amendment."

The trial court in its decision upon the application for interlocutory injunction found no difficulty in upholding this view. In the majority opinion we find this statement (52 F. (2d) 802, 804):

> "It is very obvious that whatever the United States may lawfully do in respect to rates of interstate carriers, the states may do in respect to rates of intrastate utilities."

And in the concurring opinion (p. 808):

> "We believe it to be well settled, therefore, that a state or its agencies have the power to fix minimum as well as maximum rates—either specifically as to each, or by prescribing a 'precise' or 'absolute' rate."

EXCEPTION ENGRAFTED UPON STATUTE BY LOWER COURT.

(Specifications Nos. 28 and 29)

However, a majority of the lower court held in the opinion upon the application for interlocutory injunction—a view which is adopted in the opinion on final hearing (R. 23)—that:

> "This statute, like all since the classic which imposed death on any who shed blood in the streets of Verona, is presumed to intend exception to avoid absurd and unjust consequences." (52 F. (2d) 802, 805)

and that:

> "When the field is limited, at reasonable rates, that will afford fair returns to but one, and two seek to occupy it, the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity; and any minimum rate and order which would prevent the struggle and condemn the rivals to the ordeal of slow starvation is unreasonable and void. In such circumstances the state must prevent competition for patronage and not merely competition in rates." (52 F. (2d) 802, 804).

The action of the majority of the court below in attempting to engraft an exception into the Montana statute, as above noted, is without warrant or precedent and violates the well established rule that a Federal court when dealing with the constitutionality of state statutes, challenged under the Fourteenth Amendment, must accept the meaning thereof as construed by the highest court of the state and is not permitted to re-examine the construction as to its propriety or accuracy.

Herbert et al. v. State of Louisiana, 272 U. S. 312, 71 L. Ed. 270; 47 S. Ct. 103;

Farncomb v. Denver, 252 U. S. 7; 40 S. Ct. 271; 64 L. Ed. 424;

Bunch v. Cole, 263 U. S. 250; 44 S. Ct. 101; 68 L. Ed. 290;

Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 60 L. Ed. 467; 36 S. Ct. 223;

Wolff Packing Co. v. Court of Industrial

Relations, 262 U. S. 522; 67 L. Ed. 1103; 43 S. Ct. 630;

Memphis & C. R. Co. v. Pace, 282 U. S. 241; 51 S. Ct. 108; 75 L. Ed. 315;

C. M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456; 10 S. Ct. 462, 702; 33 L. Ed. 970.

The Supreme Court of Montana in the case of Great Northern Utilities Co. vs. Public Service Commission, 88 Mont. 180, 293 Pac. 294, with the same statement of facts before it as are pleaded in the complaint herein, held that the Commission had the right to fix precise rates and that the only question presented was whether such precise rates were just and reasonable, which question the Supreme Court of Montana declined to pass upon in the absence of the evidence before the Commission. The construction placed upon the state statute was made in the light of the competitive situation existing at Shelby. The alleged right of competition asserted by the Utility was considered by the Court and rejected. Witness the following excerpt from the decision (88 Mont. 230-231; 293 Pac. 308):

> "The Utility does not claim that the rates fixed by the Commission are confiscatory; nor may it be said that the Utility is denied the equal protection of the laws. The Utility contends merely for its alleged constitutional right of determining the charge to be made by it so long as that rate or charge does not exceed the maximum fixed by the Commission. The assertion of its alleged right of competition in the instant case amounts

to what? In other words, what is the end which it seeks to attain thereby? Is it not that it may carry on a rate war to a successful conclusion? Which is another way of saying that the termination of this rate war will mean the elimination of either the Utility or the Company by either the one or the other having reached the end of its resources, or that the one will be taken over or swallowed up by the successful combatant. When this battle of rates is over, the charges made by the victor may not be fixed sufficiently high so as to enable it to recoup the losses entailed by the rate war (*Public Utility Commrs. v. New York Telephone Co.*, 271 U. S. 23, 70 L. Ed. 808, 46 Sup. Ct. Rep. 363), for those rates must remain, before the rate war as well as thereafter, according to the mandate of the statute, 'just and reasonable' based upon a fair return on the investment in the property necessary to be used, and used, by the Utility in furnishing its product to the consumer. True, the public will have gained a temporary advantage through the lowering of prices, but that the same public will lose in the long run is a matter of common experience. In the *Mapleton Case*, supra, the Supreme Court of Iowa aptly says: 'A public utility, operating under a franchise, has no constitutional right of competition. Moreover, a rate war is not necessarily competition. It may be, and usually is, a mere fight, which bodes nothing to the public but disorder and disorganization.' * * * "

Had the Supreme Court of Montana construed the state statute with the exception that a majority of the lower court have tried to read into

it, it would have affirmed the judgment upon the pleadings rendered in favor of the Utility in the lower state court.

The decision of the majority of the trial court upholding the state statute and condemning the order of the Commission because the order would not permit the Utility to invoke "the right of competition to the last extremity" cannot be construed other than as an attempt to revise the decision of the Supreme Court of Montana on a question of state law. "*Whether state statutes shall be construed one way or another,*" spoke this Court in Herbert et al. v. State of Louisiana, supra, (272 U. S. 316), "*is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law.*" (Italics ours.) And in *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 414, 17 S. Ct. 130; 41 L. Ed. 489: "The construction so given to the statute by the highest court of the state must be accepted by this Court in judging whether the statute conforms to the Constitution of the United States."

It is obvious from the language of the majority opinion of the trial court that it did not agree with the policy the State of Montana has adopted toward public utilities of the type here involved. Says the majority (52 F. (2d) 802, 805):

"* * * The state must prevent competition

for patronage and not merely competition in rates.

"When the state launches two upon the sea of competition, and the plank of patronage will support but one, it cannot in reason deny them the right of necessity to fight to a finish for financial life, even as may two castaways at sea battle to the death for the spar which will support but one without any wrong to the survivor attaching.

"The remedy is in the state's hands, by restricting, as many states do, the number of utilities to the need of the field."

Obviously the Court was not mindful of the language employed by this Court in *Twining v. New Jersey*, when it said (211 U. S. 106, 107):

"* * * In our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. * * * We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. *Under the guise of interpreting the Constitution, we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations.*" (Italics ours.)

Nor did the court give heed to the thought expressed by the Honorable Chief Justice of this Court in addressing the National Conference of Senior Circuit Justices at Asheville, N. C., in the following language:

> "We should be faithless to our supreme obligations if we interpreted the great generalities of the Constitution * * * as crystallizing our own notions of policy, our personal views of economics, and our theories of moral and social improvement."

STATUS OF RIGHT OF PUBLIC UTILITY TO ENGAGE IN BUSINESS.

The conclusion expressed by the majority of the trial court, above noted, ignores the settled proposition that engagement in the business of operating a public utility is a privilege to be exercised in virtue of a public grant or franchise; that the privilege may be granted or withheld by the state or conferred under such limitations as the state may impose, subject, of course, to the rule that a state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution.

New State Ice Co. vs. Liebmann, 285 U. S. 262, 76 L. Ed. 747;

Frost v. Corporation Commission of Oklahoma, 278 U. S. 515, 49 Sup. Ct. 235, 75 L. Ed. 483;

New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516; 6 S. Ct. 252;

Bank of Augusta v. Earle, 13 Pet. 519, 595; 10 L. Ed. 274, 311;

People's Pass. R. Co. v. Memphis City R. Co., 10 Wall. 38, 51; 19 L. Ed. 844, 848;

California v. Central P. R. Co., 127 U. S. 1, 40, 41; 32 L. Ed. 150, 157, 158; 8 S. Ct. 1073;

Denver v. New York Trust Co., 229 U. S. 123, 141, 142; 57 L. Ed. 1101, 1123, 1124; 33 S. Ct. 657;

Frost & T. Trucking Co. v. Railroad Commission, 271 U. S. 583, 593, et al, 70 L. Ed. 1101, 1104; 46 S. Ct. 605.

Those who devote their property to the use of the public do so subject to the right of governmental regulation in the interest of the common welfare.

State v. Florida East Coast R. Co., 69 Fla. 480, 68 S. 729.

A franchise of the character of the one here involved cannot, under Montana statutes, be granted by a city until the application for it has first been submitted to and approved by the qualified electors.

5074-5077 Revised Codes of Montana, 1921;

State ex rel. Billings v. Billings Gas Co., 55 Mont. 102, 108; 173 P. 799.

Such a franchise is not exclusive.

Great Northern Utilities Co. v. Public Service Comm., 88 Mont. 180, 218; 293 P. 294.

The franchise under which the Utility operates was accepted subject to the right of the State of Montana to regulate its operations in the interest of the public, including the right to fix precise just and reasonable rates for its product or service, and it was accepted subject to the risk that the city of Shelby might, upon application to and approval by its qualified electors, grant another or other similar franchise.

> Madera Water Works v. Madera, 228 U. S. 454; 57 L. Ed. 915; 33 S. Ct. 571;
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> Knoxville Water Co. v. Knoxville, 200 U. S. 22; 26 S. Ct. 224; 50 L. Ed. 353;
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> Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 13 S. Ct. 90; 36 L. Ed. 963;
>
> Piedmont Power & Light Co. v. Graham, et al., 253 U. S. 193; 64 L. Ed. 855; 40 S. Ct. 453;
>
> United Railroads of San Francisco v. San Francisco, 249 U. S. 517; 63 L. Ed. 739; 39 S. Ct. 361.

The Fourteenth Amendment does not protect against competition.

> Aetna Insurance Co. vs. Hyde, 275 U. S. 440, 447.

The State of Montana does not have the requirement found in some states that a public utility must obtain a certificate of public convenience and necessity before commencing operations, but, as above noted, it does not permit free competition. The question as to the number of public utilities of the type here involved

that may operate in a given municipality is made, by the statutes adverted to, purely a question for local determination. It might well be considered that a franchise, grantable only after approval of the qualified electors, is the substantial equivalent of a certificate of public convenience and necessity for it is not to be presumed that a municipality will approve a second franchise unless public convenience and necessity so require. The absence of a statute requiring a certificate of public convenience and necessity adds nothing to the Utility's position herein because even under a statute requiring such a certificate it is held that the rights and privileges so granted are not exclusive.

Frost vs. Corp. Comm. of Okla., supra.

ALLEGED DEFECTS COMPLAINED OF ARE CONGENITAL.
(Specifications Nos. 24, 26, 27)

The Utility having accepted its franchise in contemplation of the existing Public Service Commission Act, it is not in a position to complain of the *specific* rate powers therein granted to the Commission. If there is any defect therein, it is "a congenital defect" and as pointedly noted by this Court in *Madera Water Works v. Madera*, supra, (228 U. S. 456), "*An appeal to the Fourteenth Amendment to protect property from a congenital defect must be in vain.*" (Italics ours.) The Utility stands legally in the position of having been given express warning of what the city of Shelby might do in the matter of granting an additional franchise and of what the

Commission might do in the establishment of precise just and reasonable rates.

Manifestly, appellee has pitched its case on the theory that unless it is permitted to undersell its rival it will lose customers to its rival and thus its investment at Shelby will be impaired if not destroyed. This theory obviously is highly speculative. The complaint shows that the order of the Commission has the effect of putting the rival utilities on a rate parity, leaving them to compete on the basis of quality of service. It may be that under circumstances of equality of rates and equality of service, some or all of appellee's customers would for personal reasons transfer to its rival but such considerations cannot control the determination of the legal rights of appellee. If the Commission had authority to make the order in question the possibility, or even the probability, that its enforcement would result in appellee losing customers would not render the order violative of due process of law. The following language of this Court in Hamilton Gas Light & Coke Co. vs. City of Hamilton, supra, is directly in point:

> "It may be that the erection and maintenance of gas works by the city at public expense, and in competition with the plaintiff will ultimately impair, if not destroy, the value of the plaintiff's works for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

Our contention also finds support in the opinion

of Justice Holmes in Springfield Gas & Electric Co. vs. City of Springfield, 257 U. S. 66. In that case it appeared that a private plant was in competition with a municipal plant in the city of Springfield, Illinois. It appears that under the Illinois law the rates for privately owned utilities had to be approved by the Public Utilities Commission whereas the commission was without authority to fix rates for municipally owned plants, which latter rates were fixed by the respective city authorities. In the cited case, it appears that the rates fixed by the Public Utilities Commission were higher than those fixed by the city authorities for the competitive municipal plant. The privately owned utility sought to compel the municipally owned plant to submit to the jurisdiction of the Commission, contending that the exemption of municipally owned utilities from the rate jurisdiction of the Commission was void under the Fourteenth Amendment and that the act should be enforced as if the exemption was not there. The real complaint made was that the municipal plant was charging rates that took customers away. Justice Holmes answered this contention tersely as follows:

> "The conduct of which the plaintiff complains is not extortion, but on the contrary, charging rates that drove the plaintiff's customers away. The standard for these rates, however, according to the Supreme Court, is fixed by the Legislature. As the rates had been fixed by law at the present amounts, it would be vain to deny their validity."

In other words, Justice Holmes holds simply that if the different rates were duly fixed according to the law of the State, the fact that the private plant would lose customers to the municipal plant because this plant was permitted to charge a lower rate, would not deprive the private plant either of equal protection of the law or due process.

In a recent decision of the Texas Court of Civil Appeals, (Fifth Supreme Judicial District) City of Farmersville vs. Texas-Louisiana Power Co. et al, 55 S. W. (2d) 195, it appeared that the City of Farmersville by ordinances duly adopted, fixed rates for its own electric plant, and for a competing privately owned utility on the same basis. The private plant refused to abide by the schedule prescribed and insisted upon maintaining a schedule of rates much lower. The city brought suit to enjoin the private utility from charging rates less than those prescribed. The lower court refused the injunction finding, inter alia, that if the defendant was required to charge the same rates as the municipal plant, "that practically all of the customers of the power company would change over to the city plant and become its customers, and that the power company would not have sufficient customers or income to pay the operating expenses of their system in the city without taking into account any reserve for depreciation, and that it would result in a confiscation and loss of their properties and investments in said city." In reversing the lower court, the appellate court, with

particular reference to the finding quoted, had this to say:

> "The loss of patrons by appellee (visualized by the trial court, if compelled to charge the same rates prescribed by the municipal plant for its own observance (which, until overturned in an appropriate proceeding, are presumed reasonable, and such as appellant was compelled to impose in order to discharge its duty under Art. 1113 R. S.) is obviously based upon speculation; but even if, as assumed by the court, patrons should change from appellee to appellant as the result of competition based alone upon the quality of service rendered, which would be the case, as the record neither discloses nor is it contended that there existed any inequality in opportunity to secure business therefore loss of patronage, under these circumstances, would be simply an incident to legitimate competition, an economic loss, and in no sense a confiscation of appellee's property as that term is understood. Can it be reasonably insisted that, appellee will suffer a confiscation of property if compelled to charge rates materially higher than those being voluntarily collected by it?; its position, in effect, is that in order to prevent confiscation, under the ministry of higher rates, it was selling its service for materially less compensation. It is perfectly obvious that, if appellee is compelled to charge the rates prescribed by the ordinance, it will suffer loss only in so far as it fails to successfully compete with the municipal plant in the quality of service rendered under precisely equal conditions and opportunities.
>
> "*The law guarantees equal opportunities*

for competition, but does not and cannot guarantee economic results. This doctrine was announced by the United States Supreme Court in Aetna Insurance Co. v. Hyde, 275 U. S. 440, 48 S. Ct. R. 174, as follows: "It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business." The same idea was expressed by Judge Hutcheson in Galveston Electric Co. v. City of Galveston, 272 Fed. 147, he wrote: "Counsel on page 47 of their brief say: 'It must be borne in mind in this connection, that the Galveston Electric Company is a public service corporation, and that the Constitution guarantees it a fair return upon the value of its property.' This statement is wholly erroneous, and must have been made without thought. The Constitution makes no guarantee, to the complainant, except to protect it against legislation which would deprive the company of the right to charge rates adequate to produce a fair rate of return. If counsel's major premise that the Constitution guarantees a fixed net for return were correct, its conclusion is right, but that this proposition is unsound is manifest. Certainly the Constitution does no more than to say to the complainant that the Legislature cannot force it to operate at such rates as will deprive it of a return similar to that enjoyed generally by enterprises in that community." *If an economic disaster should overtake a public utility as the result of legitimate competition, the loss must be born as a business casualty.*" (Italics ours.)

The exact contentions made in this case by the Utility as to its alleged right of competition were made in Coleman Gas & Oil Co. vs. Santa Anna Gas Company by the Coleman Gas & Oil Co. —S. W. (2d)—decided Jan. 25, 1933, in its appeal to the Court of Civil Appeals of Texas (3rd Supreme Jud. Dist.) from a decree of the lower court enjoining it, at the instance of a competitor, from violating an ordinance of the Santa Anna City Commission fixing *specific* rates for the sale of natural gas to domestic and commercial consumers. It was there urged, as stated by the Court, "That since the field was limited, and the patronage sufficient to support only one of the two competing utilities, it had the inalienable right to engage in 'cut-throat competition', and thereby to drive its competitor from the field." This ground was predicated upon the majority holding in this case in granting the interlocutory injunction against the Montana Commission. After making references as to the majority and special concurring opinions and the order of affirmance by this Court, the Texas court observes:

> "The majority holding in the Montana case appears to be sui generia in the annals of American jurisprudence. This the opinion * * * concedes."

And, after discussion of the fundamentals involved, the court states:

> "We view the doctrine urged as dangerous, as well as novel, and are loath to give it our sanction."

The decision of the lower court was affirmed.

The holdings in the two Texas cases just adverted to follow the doctrine laid down in Community Natural Gas Company vs. Natural Gas & Fuel Company, 34 S. W. (2d) 900, a decision of the Court of Civil Appeals for the Third Supreme District, wherein it was held that where a city has granted franchises to competing corporations the city (it having the power and authority to fix rates) "is charged with the duty of fixing just and reasonable rates, both in the interest of the contending utilities and in that of the consumers" and that "the city could not make rates for one corporation which were higher or lower than the rates made for another corporation for the same services to the same patrons in the same territory that would be legally binding as fixed rates." This holding absolutely squares with the decision of the Supreme Court of Montana in Great Northern Utilities Co. vs. Public Service Commission, supra, and the policy pursued by the Montana Commission in the report and order involved therein.

In another fairly recent case (decided subsequent to the issuance of the Commission's order herein), Mapleton vs. Iowa Public Service Co. 209 Iowa 400, 223 N. W. 476, the situation presented was to all intents and purposes identical with the instant case. There the Town of Mapleton brought an action to enjoin Iowa Public Service Co., a public utility owning and operating an electric plant in the Town of Mapleton from violating an ordinance adopted by the Town of Mapleton fixing the rates to be charged for

electricity, the particular complaint being that the utility was charging a lesser rate than that fixed by the ordinance. The Town of Mapleton was also the owner and operator of an electric plant or system. The questions presented to the Supreme Court of Iowa are the same questions here presented. In upholding a decree of the lower court granting an injunction, the higher court said:

> "A public utility, operating under a franchise, has no constitutional right of competition."

It also said:

> "The owner of private property, voluntarily devoted to public use, necessarily surrenders some of his rights, and subjects himself to reasonable municipal regulation. The major right thus surrendered by him is that of fixing the price of his service or commodity. The Constitution protects him against confiscation by guaranteeing him that the price fixed by the municipality shall not be unreasonable."
>
> * * *
>
> "When the owner of private property devotes it to the public use, as herein, he voluntarily retires from the field of competition, so far as the question of rates is concerned."
>
> * * *
>
> "A rate war is not necessarily competition. It may be, and usually is, a mere fight, which bodes nothing to the public but disorder and disorganization."

The court cites approvingly the case of Eco-

nomic Gas Co. vs. City of Los Angeles, 168 Cal. 448 143 Pac. 717, from which we quote the following passage:

> "It is contended that the city's police power extends only to the protection of the consumer. But 'regulation' involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers."

In Idaho Power & Light Co. v. Blomquist, 26 Ida. 222, 141 P. 1083, brought to the Court's attention because the views expressed therein are in harmony with the decided cases (although it is concededly dictum), we find a statement of the decided trend in public utility regulation. We quote the following observations of the Idaho Supreme Court (141 P. 1089, 1090):

> "Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the rate absolutely, and neither of the competing companies can charge more or less than the rate fixed.
>
> * * *
>
> "If rates are absolutely fixed by the commission, with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. *Experience shows that while the people, or some of the people, may receive a*

temporary advantage from cutthroat competition, the general public can receive no substantial advantage therefrom." (Italics ours.)

The authority of the Interstate Commerce Commission to prevent rate competition between competing carriers, by virtue of the minimum and precise rate powers granted by the Transportation Act of 1920, supra, has been recognized by this Court. In United States vs. Illinois Central Railroad Co. et al, supra, this Court said (263 U. S. 525):

> "For now the interests of the individual carrier must yield in many respects to the public need * * *; *and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable.*" (Italics ours.)

UTILITY IS BOUND BY EXPRESS CONTRACT TO CHARGE SPECIFIC RATES.

(Specification No. 25)

There is still a further reason, apparent upon the face of the complaint, why the Utility is not in a position to assert any alleged right of competition. In its franchise there is found this proviso (R. 11):

> "Section 3. The rates to be charged for gas of whatsoever kind and the regulations governing such service shall be such as the Board of Railroad Commissioners of Montana shall order and determine."

As above pointed out, the Board of Railroad

Commissioners of the State of Montana is ex-officio the Public Service Commission of Montana (3880 Revised Codes of Montana, 1921). The franchise granted by the city of Shelby, upon acceptance, became a binding contract between the city and the grantee.

State ex rel. Billings Gas Co. v. Billings, 55 Mont. 102, 108; 173 P. 799;

City of Helena v. Helena Light & Ry. Co., 63 Mont. 108; 207 P. 337.

Under the terms of this binding contract the grantee, and therefore the Utility as successor in interest, bound itself to charge for gas only such *precise* just and reasonable rates as the Board, ex-officio Commission, should prescribe.

CONFISCATION DUE TO INADEQUATE RATES NOT AN ISSUE.

(Specifications Nos. 21 and 22)

The bill of complaint does not present or tender any issue as to whether or not the prescribed rates afford a fair return. The allegations of the complaint make it plain that the Utility is not asserting any right to charge rates *higher* than the rates prescribed by the Commission. It is only contending for the right to charge rates *lower* than those fixed by the Commission as just and reasonable. It alleges that it has not complied with the order of the Commission and refuses to comply with it (Complaint Para. XXII. R. 7). It shows that it has filed with the Commission a tariff containing rates much lower than the prescribed rates (Complaint Para. XVIII. R. 5)

and it is the refusal of the Commission to concur in this lower tariff that is made the basis of its complaint. (Complaint Paras. XIX, XX, R. 6). It does not seek to restrain the prescribed rates as confiscatory but only seeks an injunction "enjoining and restraining said defendants from in any manner preventing or interfering with the plaintiff in charging and collecting any rates for gas, not discriminatory, *less* than the rates prescribed by said order." (Italics ours) (R. 9).

Under the theory of the complaint, the facts alleged and the relief requested, any question as to the adequacy or inadequacy of the prescribed rates is moot. Until such time as the Utility asserts the right to charge a compensatory or non-confiscatory schedule of rates, the question whether the rates will afford a fair return is purely hypothetical. On this score the complaint does not present a justiciable controversy.

After all of the evidence on final hearing had been taken before the Examiner and on the day that the special court sat to hear the case on the merits, an application to amend the complaint was made by the Utility in an attempt to present the issue of confiscation due to the prescribed rates being insufficient. (R. 21). The proposed amendment was opposed by the defendants (R. 21) and disallowed by the court (R. 23). Nevertheless the court in deciding the case treated the issue as being in the case and purports to make a finding thereon. (R. 24).

In the opinion rendered in the court below,

we find the following language with respect to this issue (R. 23):

> "If now an issue, the pleadings suffice to present it, necessarily involved in 'the question of the reasonableness, in the circumstances disclosed, of the order' in suit."

From this language it appears that the trial court held that the question was presented (1) by the pleadings and (2) by virtue of the language used by this Court in affirming the order granting an interlocutory injunction. (285 U. S. 524).

Considering, first, the pleadings, attention is respectfully directed to the fact that the complaint does not set forth the *present* fair value of the Utility's property, the expenses of operation, the revenues which would be recruited under the rates prescribed, or the rate of return which would under prevailing circumstances, be a fair rate of return. In the absence of appropriate allegations with respect to these elements—elements which control a determination as to the confiscatory character of rates—the complaint cannot, consistently with the rules of pleading approved by this Court, be held to present the issue of confiscation.

Beaumont, S. L. & W. Ry. vs. U. S., 282 U. S. 74, 88-89;

Aetna Insurance Co. vs. Hyde, 275 U. S. 440, 447;

Louisville & Nashville R. R. Co. vs. Garrett, 231 U. S. 298, 314;

Prendergast vs. N. Y. Tel. Co. 262 U. S. 43;
Equity Rule No 25, Para. 3.

As stated by this Court in Aetna Insurance Co. vs. Hyde, supra:

> "In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be *specifically* set forth, and from them it must *clearly* appear that the rates would *necessarily* deny to the plaintiff just compensation and deprive it of its property without due process of law." (Italics ours.)

We need scarcely argue at this late date that the basis of all calculations as to the reasonableness of rates to be charged by a public utility is the fair value of the property at the time it is being used for the public; in other words, its present fair value.

McCardle v. Indianapolis Water Co., 272 U. S. 400; 47 S. Ct. 144; 71 L. Ed. 316;

Bluefield Water Works Co. v. Pub. Serv. Comm. 262 U. S. 679; 43 S. Ct. 675; 67 L. Ed. 1176;

New York Telephone Case, 271 U. S. 23; 46 S. Ct. 363; 70 L. Ed. 808;

Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819, 18 S. Ct. 418.

In the absence of any allegation as to present fair value, the Commission is not advised as what the claim of the Utility is in this respect,

nor is it able to take issue thereon or to prepare itself to make a showing in relation thereto. The same criticism holds good as to the element of operating expenses. In Aetna Insurance Co. vs. Hyde, supra, this Court, criticised the complaint because it failed to show that the complainants' businesses were "so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums in the aggregate enough to yield a reasonable return or profit to all the companies." (275 U. S. 448). Likewise, as to operating revenues, and in this connection attention is respectfully called to this Court's criticism of the complaint in Louisville and Nashville R. R. Co. vs. Garrett because "The bill does not show * * the return which would be permitted under the rates prescribed." (231 U. S. 315). Before a rate can be condemned as being confiscatory it is necessary to make appropriate findings as to what constitutes a fair rate or return as well as to determine what is a fair allowance for depreciation.

> United Railways & Elec. Co. v. West, 280 U. S. 234; 50 S. Ct. 123; 74 L. Ed. 390;
>
> Smith v. Illinois Bell Tel. Co., 282 U. S. 133; 51 S. Ct. 65; 75 L. Ed. 255.

Nevertheless, as to these elements there are no allegations in the complaint.

The conclusion is inescapable that it was not in the mind of the plaintiff at the time the complaint was filed to attack the rates prescribed as being inadequate. Its present position is ap-

parently an afterthought suggested, perhaps, by the views of the minority of the court upon the application for interlocutory injunction. (52 F. (2d) 805) (R. 87). It will be noted that in the special concurring opinion filed in the cause after the appeal from the order allowing interlocutory injunction had been allowed, note was taken of the defendants' position that the complaint does not present the issue of confiscation but, it will also be noted, that the contention was overruled because "the complaint * * in paragraph XX, does specifically invoke the due process of law clause of the Fourteenth Amendment." Recourse to paragraph XX of the complaint discloses that the complaint therein is against the action of the Commission in increasing the lower rate schedule of the Utility and that deprivation of the alleged right of competition is the basis for the allegation of a violation of the Fourteenth Amendment. To raise the issue of confiscation it is not enough to merely allege that an order is in violation of the Fourteenth Amendment. "*Allegations asserting in general language that the findings, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient.*" (Italics ours.)

Aetna Ins. Co. vs. Hyde, 275 U. S. 440, 447.

In City of Farmersville vs. Texas-Louisiana Power Co., supra, where the defendant was insisting upon the right to charge rates lower than those prescribed by the City of Farmersville, the trial court, in denying the city's application for an injunction, made a finding, among others, that

the city in fixing the ordinance rate did not consider whether the rate or compensation was sufficient to yield more or less than 10% net on the actual cost of the physical properties etc. of either the city plant or the defendant company's system. In disposing of this finding as being immaterial the appellate court used the following language, which is apropos of the present contentions of the Utility herein:

> "This finding we regard immaterial, as no direct attack was made by appellee on the rates as being insufficient to yield 10% on the actual costs, etc., its insistence being that it had the right to charge rates much lower than those prescribed by the city, therefore an objection that the rates prescribed by the ordinance were too low would place appellee in such an incongruous position as to render such criticism unworthy of consideration."

ORDER AFFIRMING INTERLOCUTORY INJUNCTION DOES NOT BROADEN ISSUES NOR INTRODUCE NEW ISSUES.

On the final hearing the lower court held, as above noted, that the question of confiscation was necessarily involved by reason of this Court's order of affirmance of the interlocutory injunction granted herein which order of affirmance was "without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit." (285 U. S. 524).

Bearing in mind the well established doctrine

that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised, appellants are only able to read in the order of affirmance the implied finding that the discretion of the lower court had not been abused. The Court cites as precedent for its *Per Curiam* order the case of Alabama et al vs. United States et al, 279, U. S. 229, 230-31, wherein it was said:

> "The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

Under the order of affirmance *all* questions of law were left to the trial court for consideration and determination. The sufficiency of the complaint to state a cause of action in equity on any theory is one of the questions of law involved in the case. Had this Court intended to pass upon the question as to whether the complaint presented the issue of confiscation due to inadequate rates, we have the right to assume that clear and unequivocal language would have been used. Plaintiff did not so construe the order, otherwise it would not have offered the amendment that it proposed at final hearing. (R. 21, 114). Under the accepted rules of pleading the complaint does not present the issue of confiscation due to insufficient rates, as we have above shown. It is inconceivable that this Court

intended by its order of affirmance to introduce an issue into the case that is not presented by the complaint—an issue that, so long as the Utility insists upon charging less than the prescribed rate, can only be regarded as hypothetical. It will be sufficient time when the Utility is seeking to charge and collect just and reasonable rates to pass upon the adequacy of the prescribed rates. Until such time, the Utility is not in position to assert that it has been or is being injured by a schedule of rates higher than that being voluntarily charged by it.

In Coleman Gas etc. Co. vs. Santa Anna Gas Co., supra, it will be observed that the Texas Court of Civil Appeals apparently views the order of affirmance of the interlocutory injunction in this case in the same light as appellants do.

INSUFFICIENCY OF FINDINGS OF FACT AND INSUFFICIENCY OF EVIDENCE UPON WHICH TO PREDICATE REQUISITE FINDINGS.

(Specifications Nos. 13, to 20 inclusive and No. 23)

Specifications Nos 13 to 20, inclusive, and No. 23 are so inter-related that they admit of treatment under one grouping. Specification No. 23 assigns as error the failure of the lower court to find the facts *specially* and to state separately its conclusions of law thereon as required by Rule 70½ of the Equity Rules. The other specifications in this group attack the findings specifically and the sufficiency of the evidence to support same.

The record discloses that the lower court made

and filed what it designates as "Findings of Fact and Conclusions of Law" (R. 23) but it is appellants' position that these so-called findings of fact are not the appropriate findings contemplated by the Equity Rule and the decisions of this Court. The findings of fact of the lower court are four in number and are as follows:

> "1. That the gas plant and system of Citizens Gas Company at Shelby, Montana, is, substantially, a duplication of the gas plant and system of the plaintiff company.
>
> 2. That the community of Shelby, Montana, is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated.
>
> 3. That the rates prescribed by the Commission for the plaintiff company deprive it of the right of competition, which right plaintiff has in the circumstances disclosed and said rates, if applied to plaintiff's operation, would destroy its property.
>
> 4. That, in any event, the rates prescribed by the defendant Commission would, if applied to plaintiff's operations, fail to produce legitimate operating expenses, taxes, depreciation and a fair return upon the fair value of plaintiff's property."

It will be noted that the findings are essentially general conclusions on matters of both law and fact. The first three findings are obviously predicated upon the Utility's theory of unlimited right of competition, whereas the

fourth appears to be drawn on the theory of confiscation arising out of the prescription of rates insufficient to produce revenues to cover operating expenses and a fair return upon the fair value of the plaintiff's property.

It having been shown above that the claim of unlimited right of competition asserted by the Utility is without foundation as a matter of law because (a) the Fourteenth Amendment does not guarantee any such right to a public utility and (b) the Utility is bound by its franchise contract to charge specific or precise rates as fixed and determined by the Commission, the findings need not be examined with reference to this phase. And, of course, if appellants' are correct in their contention that the bill of complaint does not tender the issue of confiscation due to inadequacy of the prescribed rates, the purported findings in this respect likewise call for no consideration.

However, if this Court holds that the issue of confiscation is present in the case, then it becomes necessary to examine the findings and the evidence to determine the validity of appellants' specifications addressed thereto.

If Finding No. 4 (R. 24) is construed as holding that the rates prescribed are insufficient as being too low, then it is defective under Rule 70½ of the Equity Rules and decisions of this court in that the lower court has failed to make special or appropriate basic findings as to

(a) The present fair value of the Utility's property;

McCardle vs. Indianapolis Water Co., supra;

Bluefield Water Works Co. vs. Public Service Comm. supra;

New York Telephone Case, supra.

(b) The revenues the prescribed rates would have produced or would produce;

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, 75 L. Ed. 255.

(c) The reasonable operating expenses of the Utility under efficient and economical management;

Aetna Insurance Co. vs. Hyde, supra.

(d) What constituted a fair allowance for depreciation;

United Railways etc. vs. West, 280 U. S. 234, 74 L. Ed. 390.

(e) What constituted a fair return under the circumstances.

United Railways etc. vs. West, supra.

The cases cited show the necessity of making appropriate findings on the various elements necessary to be considered in a confiscation case.

In the matter of substantive findings on confiscation, the record herein is practically as deficient as was the record in Wisconsin Railroad Commission vs. Maxey, 281 U. S. 82, 74 L. Ed. 717 wherein the cause was remanded for further findings of fact and conclusions of law.

The defects in the findings of the lower court are readily accounted for by recourse to the evidence. There was not before the court competent evidence upon which the court could make a finding as to the present fair value of the Utility's plant or system. The method employed by the Utility in Exhibit No. 5 of taking the value found by the Commission as of January 1, 1928 and adding to it the net additions between that date and July 31, 1932, as taken from the Utility's records—and without deduction for accrued depreciation—is not a proper or legal method of arriving at present fair value. It ignores the substantial changes downward that have taken place in the basic costs of material and labor between January 1, 1928 and July 31, 1932 and proceeds upon the assumption that the process of natural deterioration inherent in a plant of this type had been completely arrested. It is at variance with the principle referred to by this Court in McCardle vs. Indianapolis Water Co., supra, wherein it was said:

> "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase."

In Waukesha Gas & Elec. Co. vs. Railroad Comm. of Wisconsin, 211 N. W. 760, the Supreme Court of Wisconsin, interpreting the McCardle Case, supra, reversed an order of the Wisconsin Railroad Commission which assumed to establish rate base value upon the so-called split-inventory method, saying:

"A valuation which does not as to the tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements. The utility is entitled to the present fair value of its property as a basis for rate making. Hence, where there has been a period of rising prices for many years original cost plus cost of additions do not correctly measure the present value. Such a method may form the main basis of a valuation during a period of fairly stable prices, but it does not as applied to prices from 1912 and earlier down to 1922. Since the basic result to be reached is the present and near future fair value of the property, any method that will accomplish that result is a proper method. It is doubtful if any method will accomplish such result unless it substantially reflects or agrees with present or recent reproduction cost less depreciation."

There was not before the court any evidence whatsoever as to the accrued depreciation existing in the Utility's plant at the time of the hearing. The value fixed by the Commission as of January 1, 1928, was based upon reproduction cost new less depreciation. What further depreciation actually took place in the plant in the more than four and one-half years elapsing before the date of the judicial inquiry conducted by the court below and the extent of actual depreciation that accrued in the additions to the property subsequent to January 1, 1928, are not shown in any particular in the evidence. It was not possible upon the record, for this reason,

to make any finding as to present value because the rule is well established that accrued depreciation is to be deducted from cost new in arriving at the present value of a public utility property for rate-making purposes.

McCardle vs. Indianapolis Water Co.,supra.

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 10, 13, 14;

Minnesota Rates Case, 230 U. S. 352, 456-58.

Upon the evidence before it the lower court could not make any supported finding as to the revenues that would have accrued to the Utility under the prescribed rates. The Utility offered some estimates of revenue under the prescribed rates (Exhibit 5, sheet 2. R. 93 and Exhibit 6, R. 94) but these estimates were in turn based upon estimates made by the Commission in its report. It concedes that it did not apply the schedule of rates prescribed by the Commission to the actual consumption as shown by its consumers' ledgers to determine what would have been the actual experience under the rates. (R. 95). Thus, although the Utility had all the necessary data in its possession to show the actual effect of the prescribed rates, it declined to make the necessary computations for the assigned reason that "that would be a big job." (R. 95).

In Exhibit No. 5 (R. 93) the Utility set forth, among other data, a statement of "actual operating expenses from company records" for the calendar years 1929, 1930, 1931 and the first

seven months of 1932. No attempt was made to establish these expenses as normal operating expenses or to prove that these expenses were necessarily incurred in the efficient and prudent management of the Utility's enterprise. As a matter of record it appears that a part of the expenses of operation was incurred by the Utility in furnishing natural gas to its electrical department, operated as a separate unit, and that the only charge made to the electrical department was the actual cost of gas at the delivered price at the city gate. (R. 94). Furthermore, it was proven in the record through the manager of the rival gas system that the costs of operation of the so-called duplicate plant were materially less. From Exhibit No. 5, sheet 2, and the testimony of the manager of the rival utility, (R. 103-110) we have compiled the following table showing a comparison between the costs of operation of the two systems during the calendar year 1929, this year being the first full calendar year of operation of the rival company:

Comparison of Operating Expenses for the Year 1929
BETWEEN GREAT NORTHERN UTILITIES CO. AND CITIZENS GAS CO.

	Great Northern Utilities		Citizens Gas Co.		Percentage
M cubic feet of gas sold	73,160.5		76,745.8		
	(1)	Per M. C. F (2)	(3)	Per M. C. F. (4)	Column (4) is of Column (2)
Transmission and distribution	$ 2,339.76	$.0320	$ 980.24	$.0127	39.68
Commercial	3,229.60	.0442	628.72	.0081	18.32
General	8,987.64	.1228	5,637.99	.0735	59.85
Undistributed	1,166.42	.0159	382.98	.0049	25.72
Taxes	1,702.54	.0233	1,180.48	.0153	65.66
Total	$ 17,425.96	.2382	$ 8,810.41	.1145	48.06
Cost of gas	6,750.82	.0923	2,292.84	.0300	32.39
Total Expenses	$24,176.78	.3305	$11,103.25	.1445	43.41
Depreciation	(a) 3,486.10	.0476	(b) 5,426.50	.0707	148.52
Total cost of operation	$27,662.88	.3781	$16,529.75	.2152	56.91

(a) Depreciation based on allowance by Commission's Order No. 1530.

(b) Depreciation computed on basis of 12½ per cent of all tangible property (Commission rate allowed G. N. Utilities was 8% on tangible property exclusive of real estate and working capital.)

It will be noted from the comparison that during the calendar year 1929 the Utility sold approximately 49 per cent of the gas sold in Shelby as against approximately 51 per cent for its rival. Exclusive of the cost of gas and depreciation, the Utility sets forth figures indicating operating expenses of $17,425.96 or 23.82c per thousand cubic feet of gas sold as against $8,810.41 for its competitor or 11.45c per thousand cubic feet of gas sold. The Utility's cost of gas purchased is $6,750.82 as against $2,292.84, which in cost per thousand cubic feet of gas sold figures 9.23c for the Utility and 3c for its rival. The only operating expense in which the latter exceeds the former is in the annual allowance for depreciation where the Utility, basing its allowance on the 8 per cent fixed by the Commission, charged operating expenses with $3,486.10 in comparison with a charge of $5,426.40 by Citizens Gas Company, based upon 12½ per cent of the value of all tangible property. But even with this obviously excessive charge for depreciation, the Citizens Gas Company spent over 40 per cent less than the Utility in operating its system.

This vast disparity in the operating expenses of the two competing utilities, operating side by side, remains unexplained in the record. It was incumbent upon the Utility, urging confiscation, to prove that it is "well and economically organized and carried on."

Aetna Insurance Co. vs. Hyde, supra.

If we were to substitute on sheet 2 of Exhibit

5 (R. 93) the total expenses (before depreciation) of Citizens Gas Company ($11,103.25) for the comparable item as reported by the Utility ($24,176.78) instead of a deficit of $11,699.64, as shown in the last line, there would be for the year 1929 a surplus, over and above an 8 per cent return, of $1,373.89. This illustrates the essential importance of a special finding on the question of what constituted reasonable operating expenses under efficient and economical management.

In the matter of the annual allowance for depreciation the Utility's exhibits are constructed on the basis of the 8 per cent allowance fixed by the Commission. If the assumption is indulged in that the percentage fixed as of January 1, 1928, by the Commission was a fair allowance at the time, it does not hold good that the same percentage would be a fair allowance in 1932. The experience of the Utility in the meantime would have an important bearing on the question because in this respect "past experience is an indication of the company's requirement for the future" and if experience shows that the allowance is excessive there is no legal compulsion to allow similar accumulations to go on.

Smith vs. Illinois Bell Telephone Co., supra.

Furthermore, the allowance for annual depreciation must be based upon present value.

United Railways etc. vs. West, supra.

And, obviously, in the absence of a determina-

tion of present value, a proper allowance for depreciation cannot be made.

The Utility also, in its exhibits and testimony, proceeds upon the assumption that the rate of return fixed by the Commission at 8 per cent as of the time of its valuation, is presently a fair rate of return. The lower court made no finding as to what constituted a fair rate of return. While the court in its opinion and findings makes repeated reference to "fair return" it nowhere states what it considers or finds to be a fair rate of return under the circumstances of this case. The approved rule is that "The court in the discharge of its constitutional duty on the issue of confiscation *must* determine the amount to the best of its ability in the exercise of a fair, enlightened, and 'independent judgment as to both law and facts" (Italics ours.)

United Railways etc. vs. West, supra;

Smith vs. Illinois Bell Tel. Co., supra;

Wabash Valley Elec. Co. vs. Public Service Commission of Indiana, ... U. S., ..., 77 L. Ed....., Jan. 10, 1933.

THE PRESCRIBED RATES ARE JUST AND REASONABLE AND NON-CONFISCATORY.

Finding No 2 (R. 24) "That the community of Shelby, Montana, is insufficient to support and maintain, at rates affording fair return, the competing gas plants and systems therein installed and operated" was doubtless intended by the lower court as one of the findings necessary to support its conclusion that the Utility

has the right of competition "in the circumstances disclosed." While the finding is deficient in its statement of facts underlying the conclusion reached, nevertheless, because of the possibility that it might be construed as a finding bearing on the "question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit" (285 U. S. 524) appellants deem it proper to discuss the sufficiency of the field in connection with the question of the reasonableness of the rates prescribed.

The extent of the field at Shelby is to be measured obviously by the normal requirements of the community for natural gas as evidenced by the experience of the utilities. With that thought in mind appellants have prepared the following table from the record indicating the number of customers attached to each system as of December 31st of the years 1927 to 1931, inclusive, and as of July 31st, 1932, the number of cubic feet of gas sold during each of said period and the average annual consumption per customer:

COMPARISON OF NUMBER OF CUSTOMERS, VOLUME OF GAS SOLD AND AVERAGE PER CAPITA CONSUMPTION.

Number of Customers attached to each system as of December 31st of each year shown, except 1932 where figures are for first seven months.

	1927	1928	1929	1930	1931	1932 (1st 7 mos.)
Gt. Northern U.	485	454	344	337	371	363
Citizens Gas Co.		187	213	251	244	269
Total		641	557	588	615	632
Aggregate increase over 1927		156	72	123	130	147

M. cubic feet of gas sold by each utility

Gt. Northern U.	129,434	106,704	73,160	67,375	55,869	39,559
Citizens Gas Co.		12,884	76,745	76,649	76,749	67,599
Total		119,588	149,905	144,024	132,618	107,158

Average annual consumption per customer in M. cubic feet

Gt. Northern U.	266.8	235	212.6	189	150.5	108.9
Citizens Gas Co.			360.3	305.3	314.5	251.2

NOTE: Basic data for Gt. Northern U. taken from Exhibit No. 3; (R. 98a) for Citizens Gas from testimony of Witness Tillman (R. 103); annual consumption per consumer arrived at by dividing total sales for the year by number of customers as of December 31st of each year shown, except for 1932 where the average is for the first seven months.

From the above table it will be noted that the advent into the gas field at Shelby of Citizens Gas Co. was the occasion for an increase in the number of gas users as well as in the volume of consumption. Within three months after Citizens Gas Co. commenced operations, that is, as of December 31, 1928, the total number of gas consumers in Shelby had increased from 485 (the number of customers had by the Utility before its rival commenced operation (R. 5, 91) to 641 or a percentage increase of slightly in excess of 32 per cent. In September, 1932, the total number of consumers attached to both systems was 632, only 9 less than as of December 31, 1928.

The first full calendar year of competition (1929) witnessed an increase of over 30,000,000 cubic feet in the volume of gas sold in Shelby over the preceding year, or an increase of more than 25 per cent notwithstanding a reduction of 98 in the number of customers attached to both systems. Came the economic depression and a slump in the volume of sales. In 1930, despite a net gain of 51 customers, the aggregate volume of gas sales declined about 6,000,000 cubic feet. 1931 saw a net increase of 7 customers but a further reduction of volume of sales, the loss, as compared with 1929 sales, being in excess of 17,000,000 cubic feet. The falling off in volume was due, apparently, to a reduction in the per capita consumption rather than to the decrease in the number of customers. For illustration, the average annual consumption per customer of the Utility in 1927 was 266,800 cubic feet as against

150,500 in 1931, or a reduction of about 43 per cent. In the case of its rival, which showed an average annual consumption per customer of 360,300 cubic feet in 1929, the figure for 1931 was 314,500, or a falling off in excess of 12½ per cent. Notwithstanding the fact that the Utility increased its number of customers from 344 at the end of 1929 to 371 at the end of 1931, its volume of sales dropped from 73,160,000 to 55,869,000 or a decrease in excess of 23 per cent. On the other hand, although the rival company increased the number of its customers from 213 as of December 31, 1929, to 244 as of the same date in 1931, its increase in the volume of its sales was less than 5,000 cubic feet. However, figures for the first seven months of 1932, showing a total consumption for the two systems of 107,158,000 cubic feet indicate a decided trend upward in volume of sales. The average monthly consumption for these 7 months is in excess of 15,000,000 cubic feet per month, which if maintained for the balance of the year would produce a volume of sales substantially in excess of the year 1929 when the combined sales were 149,905,000 cubic feet. Under the circumstances it is reasonable to assume that the community of Shelby normally offers a field for the sale of 150,000,000 cubic feet of natural gas per year.

Whether or not annual sales of 150,000,000 cubic feet are sufficient to support two plants under the prescribed rates depends upon the amount of revenue that would be produced under the rates, the reasonable operating expenses, in-

cluding a fair allowance for depreciation, the value of the property, used and useful for the convenience of the public and a fair return under the circumstances. While, as we have above pointed out, there is not legal and competent evidence in the record upon which to base positive findings upon certain of these factors, there is sufficient data upon which to establish a prima facie case that the field at Shelby is sufficient under the prescribed rates to afford a fair return to both companies.

REVENUES UNDER THE PRESCRIBED RATES.

It was the estimate of the Commission that the prescribed rates would yield an average revenue of 27.13c per thousand cubic feet of gas sold. (R. 76). Patently this was a prediction. The only evidence that appears in this record which tests out the accuracy of the Commission's prediction relates to the actual experience of the rival utility during the calendar year 1929 when it actually operated under a schedule of rates identical with the rates prescribed by the Commission for the Utility. During that year Citizens Gas Co. sold 76,745,800 cubic feet of natural gas for which it received $21,675.24 in gross operating revenues ($5,145.49 net operating revenues after payment of operating expenses of $16,529.75 R. 109) which fixes the average revenue received per thousand cubic feet at 28.24c. The Utility during 1929 was charging its schedule 4-A so it affords no experience basis. Nor did it apply the prescribed schedule to its actual sales in order to arrive at what its probable revenues would have been (R. 95).

Taking the actual experience of Citizens Gas Co. as to average revenue received per M cubic feet of gas sold (28.24c) and applying it to the estimated normal annual volume of sales (150,000,000 cubic feet) there is produced operating revenues of $42,360.00. This figure may be compared with the aggregate total revenues of $21,675.24 (actual) for Citizens Gas Co. and $19,752.34 (estimated) for the Utility, amounting to $41,427.58 for aggregate sales of 149,905,000 cubic feet during the year 1929.

REASONABLE OPERATING EXPENSES.

We have heretofore noted the great disparity that exists between the operating expenses of the Utility and its rival during the year 1929 and subsequent periods. Taking 1929, for illustration, the Utility sets up as "actual operating expenses from company records" total operating expenses (before depreciation) of $24,176.78 which is to be compared with the actual operating expenses of its rival (before depreciation) of $11,103.25. Having in mind that the rival utility was operating a duplicate plant, but recently established, under a schedule of rates considerably higher than that charged by the Utility, which circumstances make for higher initial operating costs because of the necessary promotion work to be carried on, it would appear entirely justifiable to accept as a normal level the experience of the Citizens Gas Co., particularly in view of the fact that Citizens Gas Company was able to reduce its operating expenses (excluding cost of gas purchased and depreciation) for 1930 and

1931 below the expenditure for 1929. In 1930, Citizens Gas Company's operating expenses (exclusive of cost of gas purchased and depreciation) were $4,168.54 as compared with $15,564.80 for Great Northern Utilities Co. (R. 93) and in 1931 they were $6,433.49 as compared with $14,072.06 for the Utility (R. 93). The figures for Citizens Gas Company are computed from its manager's testimony on direct (R. 103) and redirect (R. 109), it appearing that in stating these expenses on direct examination there was included as operating expenses improper items (R. 109).

Excluding for the time being the allowance for depreciation, the expense of operating the Citizens Gas plant for 1929 (including cost of gas purchased) figures 14.45c per thousand cubic feet of gas sold. The comparable figure for Great Northern Utilities Company is 33.05c. These figures are based upon gross sales of 76,745,800 and 73,160,500 cubic feet of gas respectively. The operating expenses per thousand cubic feet of gas sold varies with consumption. It is generally true that with increased sales the costs per thousand cubic feet are smaller (R. 95).

The difference between the amount charged to operations for depreciation by the Utility and its rival has been accounted for above by the explanation that in the case of the Utility it used the percentage fixed by the Commission in its order, namely 8 per cent, whereas the Citizens Gas Company employed a flat 12½ per cent on all tangible property. Readjusting the latter (for 1929) on the basis of an 8 per cent allowance,

which is patently a high allowance, it would reduce the charge made by Citizens Gas Company to $3,472.96.

Taking, again, the actual experience of Citizens Gas Company as to the average cost of operations per M. cubic feet of gas sold, exclusive of depreciation, (14.45c) and applying it to the estimated normal annual volume of sales (150,000,000 cubic feet) there is produced operating expenses of $21,875.00. Add to this sum the amount of the annual allowance for depreciation shown on the Utility's Exhibit No. 5, sheet 2 (R. 93) $3,486.10, plus the adjusted depreciation allowance for its rival, $3,472.96, and we arrive at a grant total of $28,834.06, representing, in the light of the record, the reasonable annual cost of selling and distributing 150,000,000 cubic feet of natural gas at Shelby.

NET OPERATING REVENUE AVAILABLE FOR RETURN.

Predicated upon the above estimates of operating revenues and expenses there would be available for return upon the value of the property, used and useful, in the natural gas service at Shelby the difference between $42,360.00 (operating revenue) and $28,834.06 (operating expense) or $13,525.94.

RATE OF RETURN—AGGREGATE RATE BASE.

Proceeding upon the assumption indulged in by the Utility that 8 per cent constitutes a fair return, it will be observed that the sum of $13,525.94, constructive net operating revenue shown

above, is the equivalent of an 8 per cent return upon property of the value of $169,074.25.

While there is not competent evidence in the record upon which to predicate an absolute finding as to the aggregate present fair value of the two plants or systems, there is sufficient evidence from which an approximate idea of the claimed values of the respective plants can be obtained. The Utility sets forth in Exhibit 5, sheet 1, (R. 92) the value placed on the property by the Commission as of January 1, 1928 and by adding net additions from year to year (without deduction for accrued depreciation) it shows in the final column, as of July 31, 1932, a value of $48,256.13. Citizens Gas Company, on the other hand, states that its investment in plant and equipment is "about $46,000.00." (R. 106). Taking the amount deducted in 1929 by Citizens Gas Company for depreciation, namely $5,426.50, which was computed on the basis of 12½ per cent of all tangible property, it would appear that the value of the physical property upon which the depreciation allowance was computed was $43,412.00. Making due allowance for working capital (fixed at $2,500.00 for the Utility (R. 62) and other intangibles, it is reasonably clear that the indicated value does not exceed $50,000.00, so that roughly, so far the evidence discloses, the aggregate value of the two plants is around $100,000.00.

It therefore appears from the above calculations, which we submit are justifiably made, that the community of Shelby is sufficient to support and maintain, at the prescribed rates, the competing gas plants and systems, that is to say,

there is sufficient volume of business at Shelby to yield, under the prescribed rates, revenues ample to pay all *reasonable* operating expenses, including taxes and a fair allowance for depreciation, and to afford a fair rate of return upon the aggregate value of the property (both systems) devoted to the public service.

THE EXPERIENCE OF THE RIVAL UTILITY.

Contrasting the estimated deficit of $11,699.64, under the Commission's rates, as set up by the Utility on Exhibit 5, sheet 2 (R. 93) with the actual experience of its competitor for the same year (1929) it will be observed that Citizens Gas Company, operating a duplicate plant, with substantially the same volume of business as the Utility and charging a schedule of rates identical with that prescribed for the Utility, showed a net operating revenue of $5,145.49 (R. 109), which is the equivalent of a rate of return of 8 per cent upon a rate base of $64,318.62, which is 35 per cent greater than the synthetic rate base employed by the Utility in Exhibit 5, sheet 1 (R. 92). The net operating revenue of $5,145.49 would be further increased $1,953.54 if the charge for depreciation were adjusted from a 12½ per cent basis to an 8 per cent basis, thus making an adjusted net operating revenue of $7,380.04 or an 8 per cent return on a capitalization of $92,250.05.

This actual experience of the rival company, showing its ability to earn more than a fair rate of return under a schedule of rates identical with that prescribed in the order under attack,

when selling but approximately 51 per cent of the volume of gas sold in Shelby, fairly well illustrates that the rates of the Commission are reasonable and non-confiscatory under prudent and economical management. In January, 1930 Citizens Gas Company put into effect, without Commission approval, a base rate of 20c per M. cubic feet net (its present rate) so that its experience under the 35c base rate schedule is limited to the calendar year 1929. However, the record discloses, as set forth in the table on page 91 supra, that its volume of gas sales has remained fairly constant, and, thus, it is fair to conclude that its operations would have been amply remunerative had it not been forced by the lower rate of the Utility to depart from the 1929 level. It is noteworthy that even under the 20c base rate, Citizens Gas Company showed a net operating revenue in 1930 and 1931 (R. 110).

EXPERIENCE OF THE UTILITY.

The table set forth above on page 91 discloses that while Citizens Gas Company has been able to maintain a fairly consistent volume of gas sales, the Utility has shown a decline, its sales for1931 being approximately 56,000,000 cubic feet as against 73,160,000 in 1929, the first full calendar year of competition. However, it is to be noted in connection with the Utility's gas sales that it has increased about 45 per cent the volume of gas transferred to its electrical department. This business, we have pointed out above, is handled by the gas department of the Utility without remuneration. The only charge made

against the electrical department is the price paid the pipe line company at the city gate (R. 94).

In the matter of the number of customers, it appears that as of December 31, 1931, the Utility had 371 consumers attached to its system, this number being 114 less than the number had by the Utility prior to competition. This represents a numerical loss of 23½ per cent. However, the loss in volume of sales comparing 1931 with 1927 (last full calendar year of operation before competition) is in excess of 56 per cent. Sales for the first 7 months of 1932 would indicate that the volume of business (exclusive of transfers to the electrical department) for 1932 would approximate that of 1931.

Commencing with the year 1929 the Utility claims to have sustained losses ranging from $6,429.46 in 1930 to $8,526.13 in 1929. The first seven months of 1932, it asserts, shows a loss of practically $6,300.00. (Exhibit 3, R. 90a). All of these claimed losses are predicated upon the revenues received under the 20c base rate (R. 91) and the present flat 15c rate (R. 91). They are likwise predicated upon alleged operating expenses that are approximately 100 per cent greater than the operating expenses of the rival company. Exhibit 5 (R. 92-3) attempts to show what the deficit would have been had the Utility charged the prescribed rates. We have demonstrated, however, (supra p. 87, 88) that for the year 1929, when the division of business between the competing companies was about equal, had the Utility's operating expenses fairly approximated the operating expenses of its rival, it

would have earned the prescribed rates, more than a fair return.

ABILITY OF UTILITY TO EARN A FAIR RETURN UNDER PRESCRIBED RATES WITH PRESENT VOLUME OF BUSINESS.

Whether or not the prescribed rates would yield, on the basis of the present volume of sales of the Utility (proper remuneration being exacted from the electrical department for gas transferred to it), revenues sufficient, after payment of proper and reasonable operating expenses, to return a fair return may be a matter of doubt but it is not here material. It is fairly apparent from the experience of the Citizens Gas Company during the year 1929 that the Commission's rates would have yielded upon the aggregate volume of gas sold by both companies, revenues sufficient to defray all necessary operating expenses of both companies, under reasonable and prudent management, and afford a fair return upon the aggregate value of both plants or systems. Aggregate revenues being sufficient to provide a fair return upon aggregate value of property devoted to the public service, failure of one or the other utility to earn a fair return because of its inability to acquire its share of the patronage does not involve any violation of the Fourteenth Amendment. This was made clear by this Court in Aetna Insurance Co. vs. Hyde, supra, where it was said:

> "The Fourteenth Amendment does not protect against competition. Moreover 'aggregate collections' sufficient to yield a rea-

> sonable profit for all do not necessarily give to each just compensation * * *. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a proper profit or just compensation to all companies that happen to be engaged in the affected business."

The inability of the Utility to secure a greater share of the available business at Shelby is neither alleged nor proven to be due to any inequality in opportunity to secure business. Doubtless the purpose of the Utility in calling the manager of the rival utility as a witness and eliciting data with reference to the ownership of the stock of the Citizens Gas Company and the identity and residence of its officers and directors (R. 99) was to lay the foundation for the argument that because of local ownership of the competing utility it was in a more favorable position to attach and hold business as against the Utility with its outside ownership. However, the evidence shows that the rival utility was financed by Minneapolis, Minnesota, capital and was owned by such interests until the spring of 1931 when some 43 local residents of Shelby undertook to purchase the stock, common and preferred, from the Minneapolis holders, executing mortgage bonds upon the plant or system to secure the purchase price. (R. 102). During the period between October, 1928 and April 1931, there existed no local ownership, nevertheless the Utility lost some of its business to its competitor.

As to what specific changes in patronage from one company to the other have taken place since April 1931 the record is silent. As a matter of fact the record shows that at the end of 1931 the Utility had increased its number of customers over December 31, 1930 by 34 (R. 90a) whereas its rival showed a net loss of 7 customers during the same period. (R. 104).

In any event, transfer of patronage for sentimental or other reasons personal to the consumer is not a matter of consequence in this proceeding. Loss of patronage under such circumstances would be one of the ordinary risks of enterprise. The state is not compelled by the Constitution to guarantee economic results. The law guarantees only equal opportunities for competition.

Aetna Insurance Co. vs. Hyde, supra;

Galveston Electric Co. vs. City of Galveston, 272 Fed. 147;

City of Farmersville vs. Texas-Louisiana Power Co., supra;

Coleman Oil & Gas Co. vs. Santa Anna Gas Company, supra.

In City of Farmersville vs. Texas-Louisiana Power Co., supra, where the competitive situation existed between a municipally owned utility and a privately owned utility, the contention was made by the latter that if it was compelled to charge the same rates as the municipal plant it would lose practically all of its customers to the city-owned plant and the lower court made a finding to that effect. On appeal, in revers-

ing the lower court, the Texas Court of Civil Appeals said:

> "But even if * * * patrons should change from appellee to appellant as the result of competition based alone upon the quality of service rendered, which would be the case, as the record neither discloses nor is it contended that there existed any inequality in opportunity to secure business, therefor loss of patronage, under these circumstances, would be simply an incident to legitimate competition, an economic loss, and in no sense a confiscation of appellee's property as that term is understood.
>
> * * *
>
> "The law guarantees equal opportunities for competition but does not and cannot guarantee economic results. * * * If an economic disaster should overtake a public utility as a result of legitimate competition, the loss must be borne as a business casualty."

In Coleman Oil & Gas Company vs. Santa Anna Gas Company, decided January 25, 1933, a decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, the contention of the appellant—it being the utility desirous of charging less than the ordinance rates—was "that due to the stated local prejudice, it cannot compete with appellee under uniform rates, since thereunder appellee will get all or the bulk of the patronage, and thereby render appellant's investment worthless." After stating the contention as noted, Chief Justice McClendon disposed of it adversely in the following language:

"Under this situation appellant claims the right of self preservation by means of 'cut-throat competition.' Its survival, under such procedure, would manifestly depend upon its greater financial ability to 'take punishment.' But what if the tables were turned and it were a comparatively weak local concern, and its newly arrived competitor were a powerful inter-city concern? Would the same right be accorded the latter to drive appellant from the field and thereby destroy its property, because there was not sufficient patronage to support both? We are dealing, of course, with public utilities, whose property is affected with a public interest, and not with a mere private business. But even as to private individuals the right to compete for the sole purpose of acquiring a monopoly through destruction of a rival is denounced both by statute and by oft repeated judicial decision. The rule, as to public utilities, is that the governing body has the right to make uniform fixed rates applicable to all alike, not simply maximum rates. This necessarily denies the right of competition as regards rates; which is generally conceded to be advantageous to the public as a preventative of that destructive competition which produces monoply, and confines competition to the realm of service. This principle is applied by the Interstate Commerce Commission, and railroad and public service commissions through the country. Its validity can not now be brought in question.

"But, contends appellant, this general right of the city to inhibit destructive competition must give way to the right of self-preservation where conditions are such that

only one utility can survive. In other words the situation presented is one of natural or essential monoply with the consequently inherent right to protection therein. If it be conceded that this right to monoply exists, then it would seem to follow that the protection afforded should be just and adequate, through limiting the field to a single utility. Otherwise the weaker would in the smaller communities become the easy prey of the stronger. If monoply is essential in such cases, then it should be one created and protected by constituted authority, and not by financial power through the process of ruthless, destructive competition."

ALLEGED ADMISSIONS OR CONCESSIONS OF APPELLANTS ON ISSUE OF CONFISCATION.

In the opinion of the lower court we find the following language relative to the Utility's proposed amendment to the bill of complaint (R. 23):

"It may be observed that plaintiff's proposed amendment to its complaint in substance that the Commission's rates will not afford fair return and are confiscatory, opposed by defendants, is unnecessary and disallowed. *The fact was recognized by defendants from the beginning, they declared it in their report of which the order is a part, and conceded it throughout* save in so far as by belated and strategic answer uselessly compelling this second final hearing, they deny the knowledge of insufficiency of the field which their report discloses they in fact had. *If* now an issue, the pleadings suffice to present it, necessarily involved in 'the question of the reasonableness, in the circum-

stances disclosed, of the order' in suit." (Italics ours).

Respectfully but firmly appellants deny that they at any time recognized, declared or conceded that the rates prescribed were confiscatory and we challenged counsel for appellee to point out to this Court any portion or portions of the record that will support the language employed by the lower court.

The reference to the Commission's report is doubtless the same reference alluded to in the special concurring opinion filed in this cause upon the disposition of the application for interlocutory injunction. It was there said (52 F. (2d) 810):

> "We come now to the final question: did the Commission's order in the instant case give the plaintiff company 'a fair return upon a fair value' of its property?
>
> "We need not search far for an answer. It is lodged in the "Report and Order" of the Commission, which is attached to, and, by Paragraph XIX, is made part of the bill of complaint."

"On page 24 of the report we find the following language:

> 'Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exhorbitant rate.'
>
> "In view of this and similar language found in it, the order of the Commission stands self-condemned as violative of the Four-

teenth Amendment of the Constitution of the United States. The Commission utters a strange paradox when it says, all in the same breath, that a 'fair' rate will be 'exorbitant'!"

Because of the erroneous construction and interpretation that has been placed upon the Commission's report appellants feel justified in making full reference thereto in order that the full and correct import of the language used may be correctly understood. However, before proceeding to discuss the report, we desire to make our position clear with reference to the prescribed rates: *If the issue of confiscation, as the term is understood in rate cases, is properly before this Court, that issue is to be determined upon a consideration of the "actual effects" of the prescribed rates "in the light of the utility's situation, its requirements, and opportunities" and not upon any prediction, surmise or conclusion made, entertained or expressed prior to the effective period of the rates.*

Smith vs. Illinois Bell Telephone Co., supra.

In other words, we believe the position to be well founded that if, when tested by the record before the court, the rates under attack are not shown to be confiscatory, it is wholly immaterial to the issue what formulas may have been employed by the regulatory body in arriving at the rates.

United Fuel Co. vs. Railroad Commission, 278 U. S. 300, 310 73 L. Ed. 390.

In the report of the Commission it is stated (R. 70):

> "It has been the practice of this Commission in the past in cases involving the establishment of rates for utilities engaged in rendering the same character of service in the same locality to determine a just and reasonable rate for application in the particular locality and require both utilities to serve at that rate. (Public Service Commission vs. Blue Flame Gas Company, 19 M. U. R.....; P. U. R. 1926-D 777). This same view has been expressed by other public utility commissions (Re: Los Angeles Gas and Electric Corp., P. U. R. 1927-C 545; Re: Southern California Gas Company, P. U. R. 1919-D, 155, P. U. R. 1918-A, 604; Re: Street Railway Rates (D. C.) P. U. R. 1921-E, 13; Pacific Gas and Electric Co. vs. Great Western Power Co., 1 Cal. R. C. R. 203)."

Then, after considering definitions and authorities with reference to the character of just and reasonable rates, the Commission says (R. 74):

> "The above quoted definitions and the authorities generally recognize the rule that a public service company furnishing natural gas (or other product or service) to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained at the time the service is rendered. They also recognize the limitation upon this rule, namely, that a utility will never be permitted to charge more than the worth or value of the service which it is rendering. (Elkins

vs. Public Service Commission (W. Va.) 135 S. E. 397; Alexandria & W. Ry. Co. vs. Railroad Commission (La.) 79 So. 863; Smythe vs. Ames, 169 U. S. 466; San Diego Land and Town Co. vs. National City, 174 U. S. 739; Covington and Lexington Turnpike Road Co. vs. Sanford, 164 U. S. 578; Darnell vs. Edwards, U. S. 564; Simpson vs. Shephard, 230 U. S. 352; Guiding Principles of Public Service Regulation, by Spurr, Vol. 3, p. 528; Groninger on Public Utility Rate Making, 145; Valuation of Public Service Corporations by Whitten (as revised by Wilcox) Sec. 872). Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate. The duplication of plants at Shelby has increased the capital investment in property devoted to the public service but it has not increased one whit the value or worth of service to the consumer. To the extent that the existence of the two systems has resulted in the employment of property in the public service in excess of that reasonably required in the public service, it presents a case similar to one of overinvestment by a public utility, where it is rightfully recognized that the burden of overinvestment must not be shifted onto the shoulders of the consumers. Unrestricted competition tends to temporarily depress rates below the plane of reasonableness. Under free competition utilities feel compelled to accept business which pays for the direct cost and very little more. On account of the difficulty of estimating even the direct cost they sometimes accept business at prices returning less than the direct cost. Under a system of regulated competition the self-de-

> structive nature of free competition is eliminated. Competition becomes a matter of furnishing better or more attractive service by the respective competitors rather than the sale of products or service at lower prices. The reasonableness of the rate charged for service is or should be based primarily upon its inherent reasonableness to the consumer. It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit will have to respectively accept a return that will be less than a fair return under ordinary conditions. The rate or rates permitted to be charged must, in our judgment, reflect the fair cost of serving the consumer plus a fair allowance for return."

It is perfectly obvious from the excerpt that the Commission recognized the "fair return upon fair value" rule but was of the opinion that under the facts before it, having a due regard for the consumers, it was also bound to recognize in the fixing of rates the "worth or value of the service" factor. The right of a regulatory body to consider the value of the service to the user in establishing rates finds ample support in the authorities cited by the Commission in support of its statement of the limitation upon the "fair return upon fair value" rule. In Covington etc. Turnpike Road Co. vs. Sanford, 164 U. S. 578, cited by the Commission, the following language was used by this Court (p. 597):

> "It is alleged here that the rates prescribed are unreasonable and unjust to the company

> and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishment of new lines of transportation should cause a dimunition of the number of those who need to use a turnpike road, and, consequently, a dimunition in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property."

In San Diego Land & Town Co. vs. National City, 174 U. S. 739, also cited by the Commission, this Court said (quoting from Smyth vs. Ames):

> "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public *or the fair value of the services rendered.*" (Italics ours).

And further the Court said:

> "The basis of calculations suggested by the appellant is, however, defective in not requiring the real value of the property *and the fair value in themselves of the services rendered to be taken into consideration.*" (Italics ours).

A fair statement of the rule is to be found in Corpus Juris (Vol. 10, p. 418) as follows:

> "The public is entitled to demand that no more shall be exacted from it than the serv-

> ices rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights can not stand together. In consequence, *the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.*" (Italics ours).

It is manifestly unfair and unwarranted for the lower court to attempt to squeeze out of the language of the Commission's order, employed as above noted, a declaration or concession that it was prescribing confiscatory rates or that "the fair return" rule was "consciously and deliberately disregarded by the Commission" (52 F. (2d) 811).

Far from declaring or conceding that the rates were unreasonable or unjust or confiscatory, the Commission said in the concluding portion of its report (R. 77):

> "This schedule of rates is in our judgment a schedule of just and reasonable rates. What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will depend largely upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service."

SPECIFICATIONS OF ERRORS NOS. 30 TO 39, INCLUSIVE.

Specifications of Errors Nos. 30 to 38, inclusive (Assignments of Errors Nos. XXX to XXXVIII, R. 34-40) all relate to the reception in

evidence over defendants' objections (R. 43) of testimony and exhibits offered by the Utility for the purpose of showing that the prescribed rates are confiscatory. Specification No. 39 (Assignment No. XXXIX, R. 40) assigns as error the refusal of the court to sustain defendants' motion to strike from the record the testimony and exhibits to which objections were made. (R. 102). Exceptions were granted defendants to the court's rulings. (R. 22).

In the forepart of this Brief we have discussed the question as to whether the bill of complaint tenders the issue of confiscation due to insufficient rates. (Brief, pps. 70-78). The specifications under consideration are all concerned with that same question—the objections to the testimony and exhibits and the motion to strike same being based upon the premise that the issue of confiscation is not tendered. Inasmuch as their validity must stand or fall upon the determination by this Court upon the scope of the complaint, we, therefore, submit these specifications upon the argument heretofore made on this phase.

ALLEGED UNCONSTITUTIONALITY OF SECTIONS 3906 AND 3908 REVISED CODES OF MONTANA, 1921.

The bill of complaint alleges in very general language that sections 3906 and 3908 of the Revised Codes of Montana, 1921, are unconstitutional in certain respects. (R. 7, 8). The lower court makes no finding or reference to these contentions. It is clear that the record does not

present any question as to the constitutionality of either section.

So far as section 3906 is concerned, there is no evidence to show that the Utility made an application to the State courts for an order staying the Commission Report and Order; thus, the Utility is not in the position to raise the question.

> Investors Syndicate vs. Porter et al, 286 U. S. 461, 76 L. Ed. 1226.

Nor will this Court decide the question of the constitutionality of a statute unless the decision of such question is necessary to the disposition of the case.

> Ohio River Co. vs. Dittey, 232 U. S. 576;
>
> Light vs. U. S. 220 U. S. 523.

It was stipulated in the record that either the State of Montana, acting as the State or through any of its political subdivisions, has attempted to subject the Utility to the penalty prescribed by sections 3908 and 3888, Revised Codes of Montana, 1921. Under these circumstances this Court is not called upon to give any opinion in respect to the alleged unconstitutionality of Section 3908.

> Champlain Refining Co. vs. Corporation Commission, 286 U. S. 210 76 L. Ed. 1062;
>
> Grenada Lumber Co. vs. Mississippi, 217 U. S. 433, 443.

CONCLUSION

For the reasons above noted, the decree of the lower court granting a permanent injunction should be reversed and the case remanded with directions to dismiss the bill of complaint.

Respectfully submitted,

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APPENDIX

The particular sections of the Public Service Commission Act of Montana (Ch. 52, Laws of 1913; 3879-3913, Revised Codes of Montana, 1921) assailed by the bill of complaint as being in violation of the Fourteenth Amendment to the Constitution of the United States, are as follows:

3891. Schedule of Rates, Tolls and Charges:

Every public utility shall file with the commission within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith, or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force at time of passage of this act. Every public utility shall file with and as a part of such schedule, all rules and regulations, that in any manner affect the rates charged or to be charged for any service. A copy of so much of said schedule as the commission shall deem necessary for the use of the public, shall be printed in plain type, and kept on file in every station or office of such public utility, where payments are made by the consumers or users, open to the public, in such form and place as to be readily accessible to the public and as can be conveniently inspected.

When a a schedule of joint rates or charges

is or may be in force between two or more public utilities, such schedule shall in like manner, be printed and filed with the commission and so much thereof as the commission shall deem necessary for the use of the public shall be filed in every station or office as prescribed in the first paragraph of this section.

No change shall thereafter be made in any schedule, including schedules of joint rates, except upon twenty days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided that the commission upon application of any public utility, may prescribe a less time within which a reduction may be made; provided, however, that no advance or reduction of existing schedules shall be made without the concurrence of the commission. Copies of all new or amended schedules shall be filed and posted in the stations or offices of public utilities as in the case of original schedules. The commission may prescribe such changes in the form in which the schedules are issued by any public utility as may be found to be expedient.

3906. Action to Set Aside Rates or Charges Fixed by Commission:

Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within

ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to said commission.

No injunction shall issue suspending or staying any order of the commission except upon application to the court or judges thereof, notice to the commission having been first given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction.

If, upon the trial of such action, evidence shall be introduced by the plaintiff which is

found by the court to be different from that offered upon hearing before the commission, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the commission shall rescind its order complained of, the action shall be dismissed. If it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

Either party to said action within sixty days after service of a copy of the order or judgment of the court may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the Supreme Court of Montana the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned

and brought to a hearing in the same manner as other causes on the calendar.

In all actions under this act the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be.

3908. Public Utility Violating Laws or Failing to Comply with Order:

If any public utility shall violate any provision of this act, or shall do any act herein prohibited, or shall fail, or refuse to perform any duty enjoined upon it, or upon failure of any public utility to place in operation any rate or joint rate or do any act herein prohibited, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commission or any court, for every such violation, failure or refusal, such public utility shall be subject to the penalty prescribed by Section 3888 of this Code.

The following sections of the Public Service Commission Act of Montana, supra, are of importance in connection with the questions presented:

3880. Railroad Commissioners as Ex-officio Commission:

The board of railroad commissioners of the State of Montana shall be ex-officio, the public service commission hereby created, and for the purposes of this act shall be known and styled "Public Service Com-

mission of Montana." It shall provide itself with a seal bearing these words, by which its official acts shall be authenticated in all cases where a seal is required; and in the name as above set forth, it may sue and be sued in the courts of the state and of the United States. The secretary of the railroad commission of Montana shall act as secretary of the commission hereby created, but the business of the public service commission shall be kept entirely separate from that of the railroad commission.

3883. Public Utilities to Furnish Service for Reasonable Charges:

Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, power, water, telegraph or telephone service, produced, transmitted, delivered or furnished, or for any service to be rendered as, or in connection with any public utility shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful.

3888. Failure of Public Utility to Make Reports or Permit Examinations:

Any officer, agent or person, in charge of the books, accounts, records and papers, or any of them, of any public utility, who shall refuse or fail for a period of thirty days, to furnish the commission with any report required by the provisions of this act, and any officer, agent or person in charge of any particular books, accounts, records or papers relating to the business of such pub-

lic utility, who shall refuse to permit any commissioner or other person duly authorized by the commission, to inspect such books, accounts, records or papers on behalf of the commission, shall be subject to a fine of not less than one hundred dollars, or more than five hundred dollars, such fine to be recovered in a civil action upon the complaint of the commission in any court of competent jurisdiction; and each day's refusal or failure on the part of such officer, agent or person in charge, shall be deemed a separate offense, and be subject to the penalty herein prescribed.

3899. Fixing Rates and Making Regulations on Hearing—Complaints by Public Utility:

If, upon such hearing, and due investigation, the rates, tolls, charges, schedules or joint rates shall be found to be unjust, unreasonable or unjustly discriminatory, or to be preferential or otherwise in violation of the provisions of this Act, the Commission shall have the power to fix and order substituted therefor, such rate or rates, tolls, charges, or schedules, as shall be just and reasonable. If it shall in like manner be found that any regulation, measurement, practice, act or service complained of, is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of the provisions of this act, or if it be found that the service is inadequate, or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and make such order relating thereto as may

be just and reasonable.

When complaint is made of more than one rate, charge or practice, the commission may in its discretion, order separate hearing upon the several matters complained of, and at such times and places as it may prescribe. The commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, regulations, practices and service, after a full hearing, as above provided, by order, make such changes as may be just and reasonable the same as if a formal complaint had been made.

Any public utility may make complaint as to any matter affecting its own product or service with like effect, as though made by any mercantile, agricultural or manufacturing society, body politic. or municipal organiaztion or person or persons. Notice of the hearing upon any such complaint shall be given to the persons interested in such manner as the commission may by rule prescribe.

The following statutes (5074-5077, Revised Codes of Montana, 1921) relate to the granting of franchises by municipalities:

5074. Franchise, How Granted:

The council must not grant a franchise or special privilege to any person save and except in the manner specified in the next section. The powers of the council are those only expressly prescribed by law and those necessarily incident thereto.

5075. Grant of Franchise Must be Submitted to Taxpaying Freeholders:

No franchise for any purpose whatsoever shall be granted by any city or town, or by the mayor or city council thereof, to any person or persons, association, or corporation, without first submitting the application therefor to the resident freeholders whose names shall appear on the city or county tax-roll preceding such election.

5076. Same—Notice of Election:

A notice of such election must be published at least in one daily newspaper, if there be one published in the city or town, and if not, in some weekly newspaper of general circulation, at least once a week for three successive weeks, and such notice must be posted in three public places in the city or town. The notice must state the time and place of holding the election, and the character of any such franchise applied for, and the valuable consideration, if any there be, to be derived by the city. At such election the ballots must contain the words, "For granting franchise," "Against granting franchise," and in voting, the elector must make a cross thus, "X," opposite the answer he intends to vote for. Such election must be conducted and canvassed and the return made in the same manner as other city or town elections.

5077. When Voted, Council Must Pass Ordinance:

If the majority of votes cast at the election be "For granting franchise," the mayor and city council must thereupon grant the same by the passage and approval of a proper ordinance.

Service of the above and foregoing Appellants' Brief admitted and receipt of a copy thereof acknowledged this 4th day of March, 1933.

GUNN, RASCH, HALL & GUNN,

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By.....

Of Counsel.